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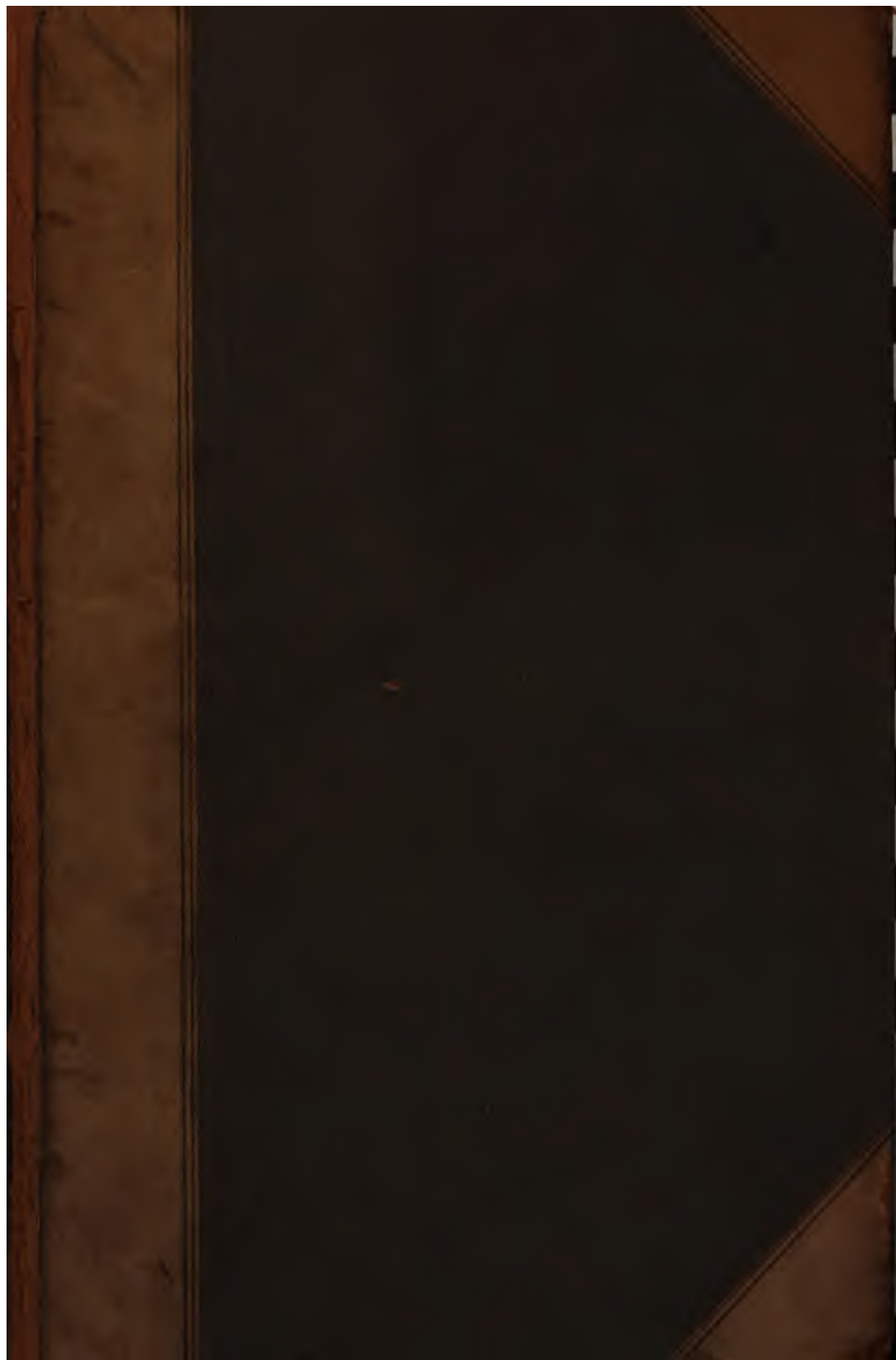
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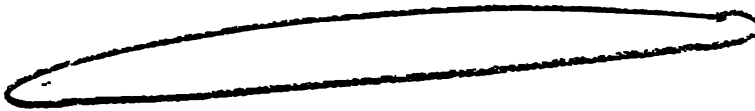
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REPORTS OF,
'COUNTY COURTS CASES

AND
A P P E A L S,

ARGUED AND DETERMINED

IN
THE SUPERIOR COURTS.

BY
EDWARD W. COX, D. C. MACRAE, AND C. J. B. HERTSLET, Esqrs.,
BARRISTERS-AT-LAW.

VOL. I.

1847—1852.

London:
JOHN CROCKFORD, 29, ESSEX STREET, STRAND.

1852.



LONDON:
Printed by JOHN CROCKFORD, 29, Essex Street, Strand.

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COUNTY COURTS CASES.

COURT OF QUEEN'S BENCH.

Trinity Term, 1847.

June 3.

Ex parte THOMAS KINNING.

Small Debts Act, 8 & 9 Vict. c. 127—Warrant of commitment—Summons to debtor—Statement of residence—Jurisdiction—Habeas corpus.

A warrant of commitment by the judge of the Sheriff's Court in London, under s. 1 of 8 & 9 Vict. c. 127, recited that T. K. "of Fleet-lane, &c. in the city of London," being indebted, &c., and then being at Fleet-lane, &c., and within the jurisdiction of this Court, was summoned, &c., and having appeared, was ordered to pay by instalments of 2l. per month, and that the first instalment had not been paid; and then ordered the said T. K. to be imprisoned in the debtors' prison for the city of London, "being the city in which the said T. K. hath been resident:"—

First. Held, on return to a writ of habeas corpus (by Patteson and Coleridge, JJ., afterwards confirmed by the Court of Common Pleas), that the warrant was bad because it did not state that the debtor had been summoned to show cause against his committal. (Lord Denman, C. J. and Erle, J. dissentientibus.)

Second. Held (Patteson, J. dissentiente), that the statement of residence was sufficient,—first, because the Act of Parliament intended a committal to the gaol of the district which had original jurisdiction in the matter, and not of that in which the debtor resided at the time of commitment; and, secondly, because, if not, still the words "hath been resident" imported a continuance of residence up to the time of the commitment.

HABEAS corpus, directed to Thomas Burden, keeper of the debtors' prison, Whitecross-street, London, to bring up the body of Thomas Kinning, a prisoner in his custody. The gaoler had returned the following warrant:—

"In the Sheriff's Court, London, &c. At a Court held the 4th day of February, A. D. 1847, at the Guildhall of the city of London, and within the jurisdiction of this Court.—Whereas Thomas Kinning, of Fleet-lane, Farringdon-street, in the city of

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London, on the 7th day of December last, being indebted to William Townley, of 8, Little James-street, Gray's-inn-lane, in the county of Middlesex, in a sum not exceeding 20*l.* besides costs of suit; that is to say, in the sum of 19*l.* 19*s.*, besides 3*l.* 12*s.* 6*d.* costs of suit,—by force of the judgment hereinafter mentioned, and then being at Fleet-lane in the city aforesaid, and within the jurisdiction of this Court, was duly summoned to appear on the 12th day of December last at this Court, to answer such questions as might be put to him touching the not having paid to the said William Townley the sum of money recovered in a certain judgment of this Court on the 5th day of December, in the year of our Lord 1846; and the said Thomas Kinning having appeared before me at the time and place aforesaid, and it thereupon then appearing to me, by the admission of the said Thomas Kinning, that the said Thomas Kinning had the means of paying the said debt and costs aforesaid in manner hereinafter mentioned, I did then and there order that the said Thomas Kinning should pay the said debt and costs aforesaid to the said William Townley, in manner following; that is to say, the sum of 2*l.*, part thereof, on the 12th day of January then next, and the rest and residue thereof by instalments of 2*l.* on the 12th day of every subsequent month, until the said debt and costs were fully paid; and whereas it has this day, at this Court, been duly proved before me, that the said Thomas Kinning has not paid 2*l.* the amount of the first instalment, as directed by the said order, although the time of the payment thereof has elapsed, and the same has been duly demanded of the said Thomas Kinning, and the same Thomas Kinning has been personally served with a copy of the said order, and the original order was at the same time shown to him; but that 2*l.*, being the amount of the said first instalment, is still due, owing, and unpaid to the said William Townley, contrary to the tenor and effect of the said order—these are therefore to will and require and authorize you, immediately upon the receipt hereof, or as soon after as may be, to take into your custody the body of the said Thomas Kinning, and him safely convey to Her Majesty's debtors' prison for London and Middlesex, in the city of London, being the common gaol wherein the debtors under judgment and in execution of the superior Courts of Justice may be confined within the city of London, being the city in which the said Thomas Kinning *hath been resident*, and there to deliver him to the keeper of the said prison, who is hereby required and authorized to receive the said Thomas Kinning into his custody, and him safely to keep and detain in the said prison for the space of forty days from the time of his arrest under this warrant, or until he shall be discharged out of custody by leave of me; and for so doing this shall be your sufficient warrant.—Given under my hand and seal at the said Court, held at the Guildhall aforesaid, this 4th day of February, 1847.

“EDWARD BULLOCK,

“Barrister-at-law, and Judge of the said Court.”

“To Lloyd Simpson, serjeant-at-mace, and
to Thomas Burden, keeper of the debtors'
prison aforesaid, or his deputy there.”

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Pashley now moved that the prisoner be discharged.—The commitment is bad: first, it does not show that the prisoner was summoned to show cause why he should not be committed. The section under which this warrant is issued (8 & 9 Vict. c. 127, s. 1) provides, that if a party “appears to have the means of paying the debt by instalments or otherwise, and shall not pay the same at such times as the Commissioner or Court shall order, or as the Court shall have ordered in which the original judgment shall have been obtained or order made, then in any of the said cases it shall be lawful for such commissioner, or the judge of such Court, to order such debtor to be committed for any time not exceeding forty days.” Now the general principle is, that no man shall be punished without being heard. [PATTESON, J.—I recollect that recently a question came before me at chambers, whether the commitment under this section was in the nature of a commitment for contempt or in execution; and I certainly thought that it was the latter. That was the case of some person in attendance on Her Majesty.] If it were in the nature of execution, it would be a satisfaction of the debt; but section 3 expressly prevents it from having that effect. [PATTESON, J.—But the debtor is to be discharged on payment of debt and costs; and that shows that it is not punishment.] It is like imprisonment, until a fine be paid; and no judgment of imprisonment can be pronounced unless the party affected is present, or has the opportunity of being so. (*Reg. v. Templeman*, 1 Salk. 55.) Neither can a distress-warrant be issued by a magistrate without first summoning the party to be charged. (*Rex v. Benn*, 6 T. R. 198.) (a) The same principle applies even more strongly in criminal cases (*Reg. v. Simpson*, 10 Mod. 248); but the broad general rule is, that whenever a judicial act is to be done, it can only be done after giving to both parties the opportunity of being heard (*Bagg’s case*, 11 Rep. 99, a); (b) and in this case the act done is clearly judicial, and not ministerial only. In the first place, the authority to convict depends upon the proof of two facts, one the ability of the debtor to pay, the other the nonpayment by him pursuant to the order; and how is the judge to decide upon those facts without hearing both sides? Unless the debtor is summoned, he is at the mercy of the creditor, who may state whatever he pleases to the judge; but in the second place, a discretion is given to the judge as to the length of imprisonment; for the words of the Act are, “any period not exceeding forty days;” and that being so, upon what materials is he to exercise that discretion? How can he satisfy himself whether the imprisonment ought to be for one day or for forty days? Nothing can be clearer than that this is a judicial discretion, which is to be exercised; and if so, both parties must be heard. [PATTESON, J.—The original summons of the judge ought only to be issued within his own jurisdiction; and it is contended that the debtor ought to be summoned again before committal; but I see no provision for issuing that second summons out of the jurisdiction.] Secondly. The statute only authorizes a

(a) See *Painter v. The Liverpool Gas Company* (3 Ad. & E. 433).

(b) See *Harper v. Carr* (7 T. R. 270).

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commitment "to the common gaol, wherein the debtors under judgment and in execution of the superior Courts of Justice may be confined *within the county, city, borough, or place in which such debtor shall be resident*," although the commencement of the section authorizes the summoning of a debtor by "any commissioner of the Court of Bankruptcy for the district in which such debtor *shall reside or be*;" or by any Court for the recovery of small debts, "*within the jurisdiction of which such debtor shall reside or be*;" and in this warrant it is not shown sufficiently that the prisoner was committed to the gaol of the county or place in which he resided at the time of the commitment. It only says, that "he hath been resident" in the city of London, which may mean at some time long before. [LORD DENMAN, C. J.—But he is described in the beginning of the warrant as "of Fleet-lane, Farringdon-street, in the city of London."] It has been held that such description does not show residence (*Reg. v. Flockton*, 2 Q. B. 535, and cases there cited); it may refer to the place of business. [ERLE, J.—*Reside* is a word having different meanings in different Acts of Parliament; here a man, who is in a district, for this purpose resides in it. Suppose that a debtor had no domicile, would he be exempted from the power of commitment?] That may be a *casus omissus*; but it does not arise here. There is a statement of residence; but it is insufficient; for it may apply to the prisoner's residence ten years ago; and the object of the statute is, that the imprisonment should be in the place where the debtor is residing at the very time of commitment; so that he may not be suddenly removed to a distance from his friends and connections; which seems to be a very reasonable qualification of the power to commit. (*Reg. v. Stogumber*, 9 Ad. & Ell. 622.) Even if the warrant showed a residence in the jurisdiction at the time of the original summons, the words at the end, "hath been resident," are not sufficient to raise an inference that that residence continued; for the Court will not infer the continuance of a state of things necessary to give jurisdiction; such continuance ought to be expressly stated. (*Reg. v. Tordoff*, 5 Q. B. 933.) Thirdly. The warrant is also bad, because it directs the gaoler to keep the prisoner forty days from the time of his arrest, and leaves the time and manner of arrest to the constable's discretion. (He referred to *Wilkes's case*, 4 Bro. P. C. 367.)

Petersdorff, (a) *contra*, was directed to confine himself to the first two points.—The case of *Ex parte Foulkes* (15 M. & W. 612; 15 L. J. 300, Ex.) is a distinct authority in support of this commitment. There the debtor was only once summoned, and then committed; and Alderson, B. said that the warrant was "a limited *ca. sa.*" [PATTESON, J.—That case does not touch the present. There the commitment was for not attending in obedience to the first summons.] The argument on the other side is, that this

(a) *Pashley* called upon him to state for whom he appeared, notice having been served on four parties; and objected that if he appeared for the attorney of the creditor, he had no right to be heard. He cited *Re Clarke* (6 Jur. 757; 2 Q. B. 619), and *Martin v. Francis* (2 B. & A. 402; 1 Chit. 241). *Petersdorff* then stated that he appeared for one of the parties served, but not the attorney.

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imprisonment is in the nature of punishment for contempt; but Alderson, B. says it is a limited *ca. sa.*; and if that expression be correct, then the original order is in effect a judgment, upon which the warrant afterwards issues, as a *ca. sa.* would—that is, without any fresh summons. This statute was passed for the more easy recovery of small debts; and this power of commitment was intended as a partial restoration of the old power of arrest. [COLERIDGE, J.—But what is the effect of the words “any period not exceeding forty days?”] That the judge is to determine the length of imprisonment. [COLERIDGE, J.—Then he has determined it without hearing the party affected?] Yes; that is the power which the clause gives. [COLERIDGE, J.—No case can be clear until both sides are heard; again and again, the imprisonment may be wrongful, because the debtor is not summoned to show cause against his committal.] To hold that summons necessary would be to import a new provision into the Act; and in the case of dishonest debtors, to render the power altogether nugatory, because it would operate upon them as a notice to keep out of the way. The cases referred to in support of the general principle, that no man shall be punished without being heard, have no bearing upon proceedings of this sort between debtors and creditors, where the ultimate object is the recovery of debts. The judge certainly has a limited discretion as to the *quantum* of imprisonment; and he may easily obtain from the creditor sufficient information to guide him in the exercise of that discretion. Secondly, with respect to the statement of residence, it is sufficient. The Court will not infer any change of residence, when the residence is once stated; and the description given of the prisoner in the first instance as “of Fleet-lane,” &c., is for this purpose a sufficient description of residence. [COLERIDGE, J.—The Sessions case (*Reg. v. Flockton*), referred to by Mr. Pashley, was very different from this. There it was necessary to show a residence during the service with a particular master, and it was held not sufficient for that purpose to say that the pauper resided with his master, who was described as “of” the place in question.] In *Yardley v. Jones* (4 Dowl. 45) it was held sufficient to describe the plaintiff in a writ of summons as “of” such a place, although the rule of Court contains the words “resides at.” [PATTESON, J.—Here the difficulty arises from using the words “hath been.”] They mean that he has been there resident up to the time of issuing the warrant.

Pashley, in reply.—First. The word *reside* certainly has various meanings, like the word “inhabit” (*Reg. v. Mashiter*, 6 Ad. & Ell. 153); but that only renders it more important that the very language should be followed instead of supplying its place by any mode of description. *Ex parte Foulkes* is quite distinguishable. The warrant of commitment was for non-appearance upon the return of the summons; and it stated a commitment of the defendant to the gaol of the county of Surrey, where he “is now residing.” Secondly. This is a judicial warrant; and the discretion of the judge can only be exercised after hearing both parties (*Reg. v. Chandler*, 1 Ld. Raym. 581); but, at all events, in a warrant of

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commitment every thing necessary to give jurisdiction must distinctly appear. (*Re Peerless*, 1 Q. B. 143.)

LORD DENMAN, C. J.—It is with a very great degree of embarrassment and doubt that I have come to the conclusion that the jurisdiction in respect to the residence sufficiently appears. I think that the residence is intended to be that which gives the original jurisdiction. I infer that partly from the language of the clause itself, and partly from other considerations in the Act of Parliament; but my brothers, who agree with me on that point, will enter into it more fully. On the whole I think it does not intend the imprisonment to be where the party at the moment shall be resident, but where the party lived at the time of the original summons. I say no more than that, because I wish to decide it more upon the other matter. I certainly am very sorry that this Act of Parliament is so framed, and that a very considerable doubt must be felt with regard to a proper decision on a matter affecting the liberty of the subject. I do not consider the order of the Commissioner in the second instance as a judicial proceeding at all. If it was a judicial proceeding, then I should be bound, I think, waiving all circumstances whatever, to state that the party could not be so committed without being previously summoned, so that he might be heard. But I think the power of commitment is completely given in the first instance. I agree with Mr. Baron Alderson's description, that it is a limited *capias*, limited to forty days, subject to a reduction, in case anything should come to the knowledge of the Commissioner which perhaps might induce a diminution of that punishment. I think that the judicial proceeding is a commitment for forty days. I think that anything less than that must be considered as a matter of indulgence, which the party may have or not, as the case may be. On the whole, I do not think that anything has been stated as being before the Commissioner to induce him to limit the period of this imprisonment. I am quite aware of the importance of not construing any statute so as to infringe improperly upon the duty of preserving the liberty of the subject, which I think it is a matter of the gravest importance to preserve in all cases. But I think there is a much greater evil, perhaps, on the other side, and one which affects the liberty of the subject itself in a much greater degree; and that is, the creation of an immense multiplicity of little processes, inducing debtors and persons in difficulty to resort to their attorneys at every turn of a little case, so increasing the costs, and placing the unfortunate debtor, when he thinks he is gaining some indulgence, at the mercy of parties who are very little likely to show him any. The object of this statute, in a very great degree, is to prevent the enormous increase of legal proceedings by such means, and I think that, where doubts are raised upon these points which have reference to the course of proceeding, it is more likely that the evil would be extended; and with reference to that, when I find there is no summons required to show cause why he should not be imprisoned for the whole amount of forty days, and no proceeding pointed out in which the facts to be tried are brought before anything that can

be called a tribunal, I think that, in the present case, the first limited *capias* must be considered to be in full operation, subject only to such reduction as by accident or omission may be considered necessary, or may enter into the mind of the party who is applying. On the first point I agree with two of my brothers in thinking that the residence is sufficient; on the other, I disagree with two of them. And the result of this case must be that this party must be remanded.

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PATTESON, J.—I am sorry to say I cannot agree with the Lord Chief Justice on either point. It is very difficult to construe this Act of Parliament; but according to my best judgment I think there ought to have been a summons to show cause why he had not paid the instalments, and why he had at the time been in default; for this not appearing I think that the warrant is bad, and I think the description of the residence of the party is bad also. I do not quite like the expression, a limited *capias ad satisfaciendum*; I do not quite agree with that. In a case before me, to which I alluded, and in which I delivered the judgment, I called it a proceeding *in the nature of a capias ad satisfaciendum*; and I think that, perhaps, was more correct. I agree that it is not a process of contempt, it is a process of execution; but unfortunately this Act of Parliament is very carelessly drawn; in the first clause it has provided for a summons to be issued to bring before the Commissioner in Bankruptcy, or Judge of the Court of Requests, a debtor who has judgment against him under 50*l*. So that it provides that there may be a summons; and if he do not appear and obey that summons, in order that he may be dealt with, or give a sufficient reason for not appearing, then he may be committed for a space of time not exceeding ten days. It provides also, if he does appear, there shall be an inquiry gone into as to his assets, and the circumstances under which the debt was contracted. He is to be obliged to answer, and everything is to be gone into, and on that the Judge or Commissioner shall have power to make an order for payment of the debt by instalments. Now, on that point it does appear that power is given to make an order to pay the debt by instalments, and you would expect to find the words, "if the Judge shall be satisfied he has the means of so doing;" but no such words are there found. However, instead of making an order for the payment of the debt by instalments, there is a power given, in case he shall be satisfied there has been any fraudulent contracting of the debt, and of several things that are mentioned, to order him to be committed for a space not exceeding forty days. Well then, after it gives power to commit for forty days, it adds, not only where the circumstances shall present fraud, and so on, but if it shall appear that he can pay by instalments, and shall not have paid any instalment which has been ordered by that Commissioner or by the original Court which gave the judgment. There is another clause in the Act of Parliament which enables the Court before whom the party may be brought for any debt under 20*l*. to give judgment, not in the superior Courts, but in the inferior. Now

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it is expressed by the Act, that such an order shall be made by reason of the party not being able to pay instalments, and that the order is to be made before a default has occurred. These provisions appear to be jumbled up together without a due consideration of the words, and without reference to the non-appearance of the party on the original summons. There is a mistake in the drawing up of the Act of Parliament; because whoever drew it up does not seem to have recollected that if there be an order for payment by instalments, a considerable time might elapse between the making such order and the default in paying the instalments, and that many cases might arise by which a debtor might be able to account for not paying the instalments, quite independently of the circumstances under which the original debt was contracted. That seems to me to be so, and that it is a *casus omissus* altogether. The Act of Parliament altogether does not provide for how the Judge is to make the order in default of paying the instalment,—how he is to inform himself, under what circumstances that payment has not been made,—but it says it is to be in his discretion to order imprisonment for forty days, or any time not exceeding forty days. It seems clear he ought to be guided in his discretion, not by the circumstances under which the original debt was contracted, wholly or perhaps at all, because he had adjudicated for the payment and directed the money to be paid by instalments, but by considering whether there was any fraud or any circumstance calling for immediate imprisonment, without which being known to him he ought not to make an order. Then, he should have before him the circumstances under which the default in the payment has been made; but it is argued by Mr. Petersdorff, on one side, that he is to inform himself by the information of the creditor. That seems a very hard thing on the debtor, because the creditor may know very little about it except the mere fact, and the debtor has no opportunity of coming before the Judge to show why he has not paid it. Circumstances might occur in which he might be able to prove that he had paid it, notwithstanding the creditor's application; and if that could not be proved, he might prove extenuating circumstances which might arise to show that the Judge had no power to imprison. And I think that, under these circumstances, justice cannot be done unless the party has an opportunity of doing so and coming before a Judge or Commissioner to state to him what those circumstances of extenuation are. Although it is expressly provided by the Act that it shall be so, there is an omission, and one which we are bound to supply according to all the well-known rules of law. In respect to the other point about the residence, I cannot quite agree with the Lord Chief Justice, that it is sufficient; but if that had been the only point, it would be one on which I should hesitate before I came to a conclusion. But what are the words? Why the words of the Act are, "to summon a man who shall be or reside within the jurisdiction of the Judge to whom the application is made." Then, it afterwards says that he may be committed. And where is he to be taken to? Not committed to a gaol where he has

no jurisdiction at all; but he shall be committed to the gaol where debtors are committed by a process from a superior Court, in the county in which he shall be then resident, not in the county where he was resident at the time; for there may be considerable time elapse when it is payable by instalments; he may have changed his residence. But it is—"he shall be committed to the debtors gaol, in the gaol of the county where he shall be resident at the time." It seems to my mind that the meaning is, where he shall be resident at the time the order is made. There is a clause in the Act of Parliament that authorizes the judge, on making the order, to send him to a place where he has not jurisdiction, because there is a clause that provides, if there be occasion, for power to the officer by whom the order is executed to have it backed by a justice of the peace of the county in which it is to be executed. I can hardly believe it can be contended that he should apply at the time the order of commitment is made. But then, here again, unfortunately, the drawer-up of this record has totally forgotten that there are two different words for a commitment which is compulsory within the first section; the one where the commitment is to be immediately upon the original summons, without appearance or default, in which case the party will be resident in the same place in all probability where the summons is served: the next sense in which it is used is where the commitment arises from some default made at a future time, in which case the residence may be changed. I do not believe that was contemplated by the Act of Parliament, because it seems by the first section the drawer had forgotten the interval between nonpayment of the instalments and the making of the order. Nevertheless, as the words are "he shall be committed to gaol where he shall be resident," and not a word is said about the jurisdiction, I cannot but think that the warrant is bad. I feel great diffidence in expressing this opinion, because I differ on the question of residence from the rest of the Court, and in respect to the other point, on which two of my learned brothers have very great doubt.

COLERIDGE, J.—As a difference of opinion prevails among my learned brothers on this important subject, it would be very presumptuous in me to say that I have formed a very decisive conclusion in my own mind on either of the points. But after the best consideration I can give to the question, it appears to me the warrant is sufficient as to the allegation of residence, and that it is insufficient in not stating the summons to the party before the order of commitment was actually made. Now, in dealing with the question as to residence, it must be remembered that we are to consider an Act of Parliament that has relation to Courts of a limited local jurisdiction and also with respect to processes which may take a long time before they come to a conclusion; allowing, therefore, ample time to raise questions of jurisdiction, by change of residence of the party against whom the proceedings are to go. The Act of Parliament has actually contemplated this, and, in the first place, in order to found the proceeding upon it, a summons

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must issue from the judge of the Court of that county in which the defendant is actually at the time, or is resident; and the warrant and the order for taking his person afterwards must go to the officer of, and must issue from, the Court of the county in which the party was resident at the time when the summons issued. Where the jurisdiction commenced, it must proceed; and the warrant must be issued to the officer of that Court (subject to an observation that I shall make presently more fully upon the 2nd section), and must be enforced by him. Now, in the first place, the words are, as to the commencement of the jurisdiction, that a summons is to be issued before any commissioner of the Court of Bankruptcy for the district in which such debtor shall reside or be. About that there can be no doubt whatever. I think there is a manifest distinction made between residence and actually being at the moment when the proceeding issues; it means that you may summon a party wherever you can find him. Residence is an important matter to be looked to afterwards; because, when we come to look at the power to commit, the section says it shall be lawful for "the commissioner or the judge to order such debtor to be committed for any time not exceeding forty days to the common gaol, where the debtors under judgment are imprisoned, in the county or place in which such debtors shall be resident." If the words had been "in which such debtor shall be so resident, as aforesaid," or if it had been "shall be resident as aforesaid," in either of those cases, the simple addition of the word "so," or "as aforesaid," would have left no doubt. In my opinion, we ought to read the words as if they were there; and I found my opinion in part on the convenience of the thing, and in the second place from its being the judge who has the original jurisdiction, and his being the person who undoubtedly is to issue his warrant. I should require to find some express authority for holding he had any right to issue his warrant to the gaoler or officer in any other jurisdiction than his own. If we look to the second section, there is a provision made for this very case; and I read that in a very different way (and I do it upon general principle) from the view which my brother Patteson has taken of it. This provision applies in all cases where final judgment shall have been obtained, or an order for the commitment of the defendant shall have been made under this Act (which is this case), and the defendant shall be out of the jurisdiction of the Court. Now that must be after the time the proceedings have commenced, because he must have been within the jurisdiction at the commencement, or it could not have commenced at all. This, therefore, I assume is the case of a man having changed the jurisdiction. Then this Act of Parliament says, "it shall be lawful for the officer charged with such warrant or order of commitment to apply to any justice of the peace acting in a foreign county,"—to express myself shortly. Now, if the judge have power to order the commitment out of his jurisdiction, having commenced in it,—if he had a right to commit,—a right to make an order of committal in Surrey or Berkshire, or any other place,

there would be no necessity to invoke the aid of a local magistrate in a new jurisdiction. However, it must be so done, and he must apply to a justice of the peace. Then the justice of the peace is to endorse the warrant, and thereupon the officer shall take and seize the person of the defendant, wherever he shall be found within the county, in which county the gaolers of the county are to obey the order, and the constables and other peace officers are to be aiding and abetting. What is the party to do? I should expect, if he is to take him to the gaol of such county, that that would be specified; but it is not so; all that is said is, that he shall take and seize his person wherever he shall be found; so leading the Court to suppose that the warrant being backed by a justice of the peace of the county, the peace officer shall take him, that he shall execute the original order and then carry him to the gaol of the county in which the commissioner or the judge first had jurisdiction. It seems to me, therefore, that this is the correct interpretation of the Act of Parliament; and if so, there is no doubt that, without any straining of the words whatever, without giving them a meaning which they have not within the Act of Parliament, what is stated on this warrant is quite sufficient within the words of the Act of Parliament. There is another way of coming to a conclusion, by adopting the interpretation my brother Erle suggests. In the warrant there are the words "hath been resident," and that imports a continued residence in that place which has been originally stated in the commencement of the warrant; for the warrant states thus, "so and so, of such a place," which gives him a description, and being found in such a place, he is summoned in that place, and that order is to be taken to mean in that place wherein he "hath been resident." I do not found my judgment on that, but rather on the interpretation I have given to the Act of Parliament. It means that when once you establish the jurisdiction, it is to that parish, and that alone, the judge or other local power has the power to commit. Upon the second point, with regard to the necessity of the summons, I must decide *that* upon the general principles, which I think are derived from the statute, or from the common law in the absence of any express provision in the statute law. And if there be a judicial act to be done in reference to the liberty of the subject, before a judge has decided upon that he must hear both parties; he must give both parties an opportunity of being heard. Now is this or not a judicial act? What is the course to be taken? Judgment has been obtained in this case in another Court; although judgment has been taken out, the party has been brought before the commissioner for the purpose of pursuing the course for the recovery of the demand given by this Act of Parliament. An order has been made that he shall pay the debt by instalments, and that is all that has been done. Now it is immaterial what period of time this is to run, or into what amount of instalments the debt was to be divided. In point of fact, we know that up to the extent of 20*l.* or 19*l.* 19*s.* the jurisdiction applies. It may be divided into as many as nineteen months in which the

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creditor is to take it. And the foundation of that is, that at the time when the order is made he has the means of paying. The Act of Parliament expressly specifies that, and the judge founds his order upon that. That is the ground on which it proceeds. What, then, is the case at the commencement of the nineteen months? On the omission to pay an instalment, is this a suspended *capias*, which shall hold for forty days in point of duration, or is the imprisonment to be limited to forty days only in point of time? It is that the judge shall order that he be imprisoned for any period not exceeding forty days. Now, in the first place, how is the judge to arrive at the fact that the instalment has not been paid? That is rather material: he is to take it on an *ex parte* statement from one who is a creditor. Suppose again he has no doubt about it, and by an examination of the thing it appears that on consideration of having been paid eighteen instalments, the creditor forgave him the nineteenth; whether that was binding or not would be immaterial, but it shows that circumstances might arise to be inquired into, and requiring his judgment, whether the warrant should issue at all, or whether it should issue for the forty days, or for an hour only. Mr. Petersdorff admits the circumstances to be fit to be inquired into, but he says the commissioner is to determine from whom and to what amount he should require the information. Now it never can be said that his authority is quite conclusive on that matter; it never can be said that it is consonant with the principles of the English law that a matter of that sort should be determined at the discretion of the judge, or that his authority can be deemed to be conclusive on an *ex parte* statement. What I ventured to say in the course of the argument was, that no case is clear till you hear the other side. It is an *ex parte* statement which may turn out to be most untrue when you hear the statement of the other side. On either of these grounds it seems absolutely essential the judge should hear both sides before he makes an order. My Lord has been moved by the weight of the inconvenience that may result to debtors from this, and that it may lead to great expense in the application to attorneys and persons to assist in resisting them. This is the evil incident to all jurisdiction as to these matters, and cannot be removed. Where you have a code of laws, you never can prevent that evil. We must take general principles, and proceed on general principles, and we must leave the Legislature to remedy the inconvenience that may result from them or from any imperfection in their enactments. Till I see there is something more than mere silence on that,—and it is admitted that the Act is perfectly silent,—until something more than mere silence on the part of the Act appears, I think I shall retain the opinion I now express, that on these grounds this warrant is insufficient and that a summons was necessary.

ERLE, J.—It is with great diffidence, from the difference of opinion between my learned brothers, that I have come to the conclusion at which I have arrived. I have given the best attention

that I can, and my opinion is, that the return to the *habeas corpus* shows a valid committal. Two objections have been made: one in point of form, and one in point of substance. The point of form is, that the commitment is to the gaol of the county, or city of London, where the debtor hath been resident, and who is described in the beginning of the warrant to have been at the time that the summons issues resident in the city of London: and it therefore amounts to this, that you were resident in the city of London when the summons issues, and I commit you to the gaol where you have been resident. It appears to me if the residence is continuing, because it may be described as a residence that was existing at the time these proceedings commenced, and was continuing and continued in fact down to the time when the commitment was made, in that way the return will be valid, construing the Act in the most limited sense to require the commitment to be to the gaol of the county where the prisoner was resident at the time the commitment was made. It appears to me, if that was the necessary construction of the Act of Parliament, that the judge, who has jurisdiction over the matter, by summons, may commit him to the gaol of the district where he was resident at the time when the proceeding commenced. I think it would be a matter of obvious inconvenience if the debtor, who was shown to be resident in the country, brought before a commissioner of the district where he was so residing, and committed, should be able to discharge himself from that prison by showing a change of residence between the time of serving the summons and the time of the order of commitment. Residence is a word of very varying meaning, and not less so within this Act of Parliament. Much less would satisfy it than the change of lodgings from the one county to another—a matter that might be done in an instant. Therefore it was necessary for the Act of Parliament to be construed that the commissioner of the district where the debtor was residing at the time that the summons is served upon him, should have jurisdiction to commit him to the gaol of the county in which that district is situated, that being the gaol of the county in which he was so resident, as mentioned in the commencement of the section. On that ground, the return on the face of it being clearly sufficient, it is not necessary to consider whether the word “reside” under this Act of Parliament, has any different meaning from the word “being.” A summons may be served on a debtor in a county where he shall be or reside, and the debtor may be committed to the gaol of the county where he shall be resident. It is not necessary to consider whether these two words were, in the mind of the Legislature, synonymous. That being the objection in point of form, the objection in point of substance is, that the judge in this case has committed the debtor for the nonpayment of an instalment, and it does not appear that the debtor was summoned to appear before him to show cause why he should not be so committed; and, upon the best consideration I have been able to give, it appears to me that, according to the

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words of the enactment, the judge had authority, under this Act of Parliament, because the Act of Parliament has provided for the power of commitment in a variety of events; and the power here exercised is, that if, the debtor having been summoned before him, the judge shall be of opinion that he is able to pay the debt by instalments, and he shall not pay the debt accordingly as the instalments are directed, the judge may commit him. Now the Act of Parliament only requires one summons (which appears by the return to have been sent), the debtor has appeared before the judge, and the judge has been of opinion he is able to pay by certain instalments, namely, by 2*l*. per month, and the return shows that the judge had inquired into the facts, and satisfied himself that the first of the instalments was not paid. The words of the Act had not been complied with, and I think the judge had authority to issue the warrant of committal. It has been contended against this, that it is harsh to commit a party to prison without giving that party an opportunity of showing cause against it. It appears to me in answer to that, a writ of *capias* against a debtor on his failure to pay his debts would be wholly inoperative if a summons was necessary to give him notice that a *capias* was to issue. A *capias* is to be resorted to at the discretion of the judge, and resorted to in case the debtor shall be, in his opinion, unable to pay his debts, or who, in his opinion, may have made a default; and the case may be supposed where a debtor was about to be absent, or was making away with his property. If a summons was necessary to be given, that was returnable some days afterwards; and in case of its not being satisfactorily answered, then that a *capias* shall issue. Common experience would show that a *capias* under such circumstances would be altogether inoperative against that class of debtors to whom it ought to be directed. The Act of Parliament appears to be, upon a proper construction of it, wholly devoid of harshness. It would appear that, down to so very short a time as 1845, if a creditor recovered judgment against a debtor, he might issue a *capias* against him, and take him for the debt and costs. An Act of Parliament had passed which said in all actions for debt under 20*l*. the creditor shall not be at liberty to take the body of the debtor. It was supposed that some evil to the creditor or rather benefit to the debtor would be done. And then the Act passed which is the subject of the present discussion. That Act restores the right of issuing a *capias ad satisfaciendum*, but not to the extent to which it existed before the alteration I have adverted to, but modifying the alteration, and raising the construction that I have been led in my mind to put upon it. A party who has recovered a judgment for 20*l*. or under, must, before he can take the body of the debtor, summon that debtor, and various inquiries are to be gone into; among other things, whether he is able to pay the debt, or can pay it by instalments; and the judge having decided these two questions in the affirmative, the Act says he may order it to be paid by instalments, with a discretionary power to commit, which

is very much the same as if the *capias ad satisfaciendum* was issued on the first application, and as if it had not been suspended. If the debtor shall from time to time pay the instalments as he is directed to pay them, in that case he shall not execute the order; but if he shall not pay, then on such default the judge may execute it. In the present instance the instalments were ordered to be paid; if default is made, the creditor has not the power of issuing a *capias* and executing it, but it is in the discretion of the judge to issue it, and the creditor must go to the judge and must make an application and satisfy the judge that the debtor ought to be taken. If by *ex parte* statements he does so satisfy him, and a *capias* issues and the debtor is taken, there may be occasional hardship in the case of an honest debtor. And the operation of the Act clearly must be to apply to the case of a fraudulent debtor, and it would almost amount to setting the Act of Parliament at defiance. If there is any evil in the case, such as a debtor wrongfully taken by virtue of this Act, the form of commitment appears to point out a satisfactory remedy, because it is a committal for forty days, or until he shall be discharged by my order,—reserving a discretion to the judge by the order which has been issued, to enable him, if he has a just cause of complaint, to make known his grievance. And under that power the judge may at any time release him from imprisonment, if, in his opinion, he had been imprisoned wrongfully. Taking into consideration the balance of evil on both sides, I have felt it to be my duty to come to the conclusion that the prisoner ought to be remanded. The decision is one which has application to the County Courts Act, which contains the same power of commitment; and therefore the same questions may there arise.

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*Trinity Term, 1847.**Re THOMAS KINNING.**Commitment for Nonpayment of Instalments.*

A judgment-debtor having been ordered to pay the debt by instalments under the 8 & 9 Vict. c. 127, s. 1, was committed to prison for default in payment of one instalment. The prisoner having been brought up on a habeas corpus, and the warrant not showing that the debtor had been summoned to show cause why he had made such default, was held defective, and the prisoner was discharged.

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THE prisoner had previously been brought up on a *habeas corpus* into the Court of Queen's Bench, and was remanded to his custody. *Pashley* now made an application to this Court, the prisoner having been brought here on a *habeas corpus* to discharge him out of custody, on the ground that the warrant of commitment was defective in not showing that the prisoner had been summoned to answer his default in nonpayment of the instalment.

The argument and warrant of commitment are reported in the case in the Queen's Bench, *ante*. It is not thought necessary to mention the other grounds, as they were not argued or alluded to by the Bench.

Petersdorff was heard *contrà*.

JUDGMENT.—*June 4.*

WILDE, C.J.—The Court have looked very anxiously on the question which arises in this case, as they would naturally do when it has been before another Court of such high authority, which could not come to a satisfactory conclusion on the question, those very learned persons having differed in the construction to be placed on this statute, and having considered all this, we think that this return is not sufficient, and that the defendant is entitled to be discharged by reason of the deficiency of the warrant under which he was taken into custody. This statute is, to a considerable extent penal, because it gives a power of imprisonment not by way of satisfaction of the debt. If a defendant is taken into custody under this Act, it is so framed as to reserve to the plaintiff his right to obtain satisfaction of his debt afterwards. It was otherwise under the old law, but here it is simply used by way of punishment or coercion, and the party is subjected to imprisonment according to the circumstances of his particular case. It appears by the section in question that if a party wishes to recover or enforce payment of

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his debt he is to apply to some one of these Courts for an order on his debtor, and he is to be summoned, and an inquiry is to take place in the matter. One material part of this inquiry is his means of payment; and the Act infers a discretionary power, for the judge is to exercise his discretion with regard to the time to be given for payment of the debt; that discretion depending principally on the means of the individual to pay. He has power to commit in certain cases pointed out by the Act of Parliament, such as the concealment of property, or misconduct in the mode of contracting the debt; but that imprisonment is not in satisfaction of a debt; it is punishment for misconduct in the original contraction of the debt. But, among other things, a power is given to inquire: he is to inquire into the means of the party to pay, and if he has means and does not pay immediately, it is to be adjudged when he is to pay. If he can presently pay, he is to be ordered presently to pay; and if he does not do so, he may be committed. But it is obvious it must be clearly known as material to that Act whether, at the time he makes default, he had the means of payment; for it is to be observed that this statute only deals with the person of the debtor, and leaves all the modes of acting with regard to property under the old Acts untouched. By the present Act an additional remedy is provided against the person under certain circumstances, apparently with the view of punishing him: but this remedy is only in force on the judge being satisfied that he wilfully withholds payment, and has the means of making it. The Act is founded, apparently, on the inhumanity of sending a man to prison when he has not the means of paying, reserving a power to punish him if there is fraud found connected with the debt. The course of proceeding is this: it appears the party is to be summoned, and an inquiry is to be made as to his means of payment; and if it appears that he has the means of payment, by instalments or otherwise, he shall be ordered to pay accordingly. It is necessary in the outset that the commissioner shall exercise a discretion as to the periods to be named for payment. It is necessary that he should inquire into the then circumstances of the party, and as to his future means of payment, because his not being ordered to pay at once presupposes that he has not the means of paying then, and therefore there must be an inquiry as to his future means of paying: for if he have the present means of paying, he is to pay; and it is only on the presumption that he has not the present means of paying, that the judge, under this Act of Parliament, would be authorized, acting in the spirit of the Legislature, to grant time for the payment. Well, then, if time is granted, with reference to what object is it granted? With reference to the subject of the means—the probable means, at the period when the payment is directed to be made, it appears, as to that point, that after the judge shall have made an order specifying the certain periods of payment—there is to be no other inquiry upon the subject—if the debtor do not pay, but has the means of paying the amount, according to the order of the judge, there is a power to commit for a term not

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exceeding forty days. What is to regulate the judge in prescribing the period of time for which the party is to be committed? You find that the original order is to be framed with reference to the means of payment; what is to be the foundation of the judgment to be formed with regard to the time for which the party is to be committed? Can it be doubted but that the debtor's means of paying must be at least one of the essential points of the inquiry? And if that is to be one of the essential points of that inquiry, the judge cannot by possibility make an effectual inquiry into the means of paying, or at least with any certainty of his conclusion being well founded, unless he has heard the party who must best know with certainty the means he has of payment, and who is the only person to know his means of payment. And with regard to payment, many circumstances might exist of bodily misfortune, disappointment, and loss, which the creditor might have no means of knowing, or any other person likely to be brought before the judge by the creditor. As the period for commitment, therefore, is discretionary, it would seem that the inquiry is to regulate the discretion; and whereas inquiry is necessary to regulate the discretion, common justice and general principles of right will require that the party most interested in the result of the inquiry—the party most fully possessed of the means of best answering satisfactorily the object of pursuing the inquiry—should be heard. When, therefore, the Act distinctly points to an inquiry of some kind, or some sort, as it must be taken to do when it makes the period of imprisonment discretionary, it seems to follow that it is left to the general principles as to the parties to be heard upon such inquiry so to take place, and as it may make a most material difference, and must make some difference to the party whether he is to be committed for two days, or for a week, or for forty days, while there remains matter upon which the judicial mind is to be exercised, it seems to follow that the party who possesses the best means of giving the information, and who is deeply interested in the result of the inquiry, should be heard. Here is, therefore, something for inquiry, for that inquiry which is made the foundation of the judicial discretion. How can it be meant that there is to be an exclusion of the party from being heard on inquiry, and, on that inquiry, on facts and circumstances more immediately connected with his own condition? When, therefore, it distinctly points to a summons, hearing and examination, in the first instance, and when it points to a subsequent inquiry, unaccompanied by any words excluding those ordinary means of judicial information, namely, by hearing the party interested in the inquiry at all, the safest rule of construction is, that the party should have notice before he is committed. We find the statute based altogether upon the principle that a debtor shall not be imprisoned who has not the means of paying; and that being the principle of the Act, I think it is best construed by saying that the judge should have the means of forming a distinct judgment, before he determines on the commitment, which is not to be by way of satisfaction, but by

way of punishment. Feeling that doubt and hesitation in my own judgment, which I ever must feel when I hear the learned judges of the Queen's Bench have entertained a different opinion, I am yet constrained to say, that the construction most consonant with the views of the Legislature, and most consistent with general principles, and with the proper administration of justice, and the true construction of the Act itself, is, that when default is made, if the creditor asks for the commitment, in order that the judge may have the proper means of knowing what is the proper period of commitment, the debtor, who may have the means of laying before him the circumstances within his knowledge, must be summoned. I think, under the circumstances of this case, the warrant is defective in the two respects pointed out, and therefore this rule ought to be discharged.

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COLTMAN, J.—I am of the same opinion as that which my Lord has already expressed; and, with all due deference to the learned persons who have entertained a different opinion, I cannot but say that it appears to me to be a very clear case on the construction of this statute, regulated by the ordinary principles of the government of Courts of Law. Now, it seems to me to be clear that the act done in this case is not a ministerial but a judicial act. That being so, we have to proceed according to all rules and general principles that regulate our law as laid down in the case of *Harper v. Carr*, 7 T. R. 270; it decides that in cases of that nature, where a judicial act is to be done, it can only be regularly done after hearing what the parties have to allege. Now, the only argument that has been brought forward, as I can understand, for deviating from the analogous principle of the law is, that it will be very inconvenient in this case, because the service of such a summons on the party will be a notice to him to abscond and get out of the way. But, considering the nature of this Act of Parliament, I do not think that is a practicable probability, because these matters are all in cases of extremely small debts. It may be reasonable that there should not be a power to commit *ex parte*, without hearing both the parties, unless there is any strong probability of the party absconding. In cases where there were large sums in dispute, it was worth the while of the party to abscond, and carry off his property out of the country. But this Act only applies to debts under the sum of 20*l.*; therefore I cannot think there is any great probability that the party would abscond from such a debt as that. Generally speaking, it happens that the debts are payable by instalments, in small sums; therefore I do not think that, looking at the matter the Act is contemplating, it was intended to deviate from the ordinary course of legal administration. Surely it is to be considered how highly penal this Act is; that a party under this Act may be imprisoned for forty days, *toties quotie*, and that is no satisfaction for the debt. It is certainly fit, in such a case, that we should not deviate from the ordinary principles that regulate judicial discretion. It seems to me, therefore, that the

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judge ought to inquire before he commits or determines whether he should sentence a party for forty days, or for what less term than that. He must exercise discretion on that point, and ought to be aware of all the circumstances that can be brought before him by the party who has committed the default. It appears to me, in this case, the Act has not been satisfied, and that the party ought to be discharged.

MAULE, J.—I think, on the substantial ground which appears on the objection to the return, that the defendant is entitled to his discharge. The proceeding is one which is sought to be sustained by and arises under the 1st section of the 8 & 9 Vict. c. 127 which gives the power to the judges, being barristers or attorneys of a certain standing, to enforce judgments obtained in the said Courts or in other Courts by a certain proceeding that is to be taken in reference to enforcing the payment of debts, and also in reference to the punishment of the debtor if he has misconducted himself. It requires that the order shall be obtained in the form prescribed by the Act; and upon his obtaining it, the judge is to issue a summons in the form also prescribed; and then, upon the party appearing before him, he is to make an order, or if he does not appear, having been summoned, or by his agent, the commissioner is bound to make an order for the payment of the debt by instalments, or otherwise. Then comes the jurisdiction: the judge is to commit; and in case the debtor shall not attend as required by the said summons, and shall not allege a sufficient excuse for not attending, that is one case; “or shall, if attending, refuse to disclose his property, or his transactions respecting the same, or respecting the contracting of the debt, or shall not make answer thereof to the satisfaction of the commissioner or Court or shall appear to such commissioner or Court to have been guilty of fraud in contracting the debt, or of having wilfully contracted it without reasonable prospect of being able to pay it, or of having concealed or made away with his property in order to defeat his creditors;”—(then comes the portion of the section intended to be considered here,) “or if he appears to have the means of paying the same by instalments or otherwise, and shall not have the same at such times as the commissioners or Court shall order, or as the Court shall have ordered, in which the original judgment shall have been obtained or order made,” then with reference to the power the section goes on, “then in any of the said cases it shall be lawful for such commissioner or the judge of such Court to order such debtor to be committed for any time not exceeding forty days to the common gaol wherein the debtors under judgment are imprisoned.” Well, then, that power appears to be exercised in certain cases, not of simple nonpayment, but in cases clearly of fraud or conduct in the nature of fraud; cases in short, of delinquency,—that is, omitting to do something which he ought to do, not the omitting to do something he is merely bound to do—that is, something he is morally bound to do and legally bound to do. Such a person, and such a person only, is

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to be the subject of this power of imprisonment, because with respect to those who do not attend the summons served on them, they may be presumed to belong to one of the classes of subjects enumerated, either those persons guilty of the fraud of contracting a debt or contracting it without the reasonable prospect of being able to pay it. A person in this class is a person who must appear to have the means of paying the sum by instalments at the time that it is not paid, and at the time that the commissioner or judge shall order it to be paid—that is a delinquency, and a thing in the nature of a fraud. If the debt, which is ascertained by a judge beyond all possibility of being disputed, and which is a debt ordered to be paid by a competent jurisdiction, is not paid, it may be by misfortune, or it may be a fault; it is a thing in the nature of a fraud and delinquency if it is contracted by a person who has not the means of paying, and it is for an offence of this kind that a prisoner is to be committed under the *ca. sa.*; it is for this he is to be committed—for not paying, being able to pay. The form of remedy given by the statute against debtors merely unfortunate, was a power given, not merely by way of remedy and of enforcing payment by the creditor, but by way of punishment to the debtor; and incident to that also, the power of exercising a degree of coercion as long as the time of imprisonment lasts, which may be ancillary to the payment of the debt. Now the effect, therefore, of this section is this, taken shortly, that if a man shall fraudulently omit to pay the money, or omit certain other acts, when he ought to pay it, he may be punished for that by an imprisonment not exceeding forty days. That is the effect of the section. Now, certainly, upon the general principle of law, it would be necessary that a person, before he is to be punished for misconduct, if he be capable of showing mitigating or aggravating circumstances, should have the opportunity of being heard, and if an order is made upon the first hearing upon his attendance under the summons mentioned in schedule A. then undoubtedly he would have an opportunity of being heard and being told “there are circumstances that at first sight certainly appear as if he was guilty of fraud;” and then if he have not a reasonable prospect of paying, he may say, “I can show something in my case that may induce you to alter your opinion,” and so alter the complexion of the case altogether. The order to commit for nonpayment of the debt, when it is to be paid by instalments, can only be by his omitting to attend on the summons. Now, if he is able to pay it, the committal is to take place on the omission to pay it, he being able to pay at the time, and that cannot be inquired into on his appearance, and being subject to a discretionary power; and why should he not have the like opportunity of being heard in his own defence when there is an imprisonment for a delinquency that arises after the order to pay by instalments has been made, by not paying, he having the means of paying? It must mean, that having the means of paying at the time he is called on to pay, and not paying, constitutes the delinquency for which he is to be committed, without any inquiry

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except that by the affidavits of the adverse parties. It certainly appears to be contrary to the general principle of justice that a person should be punished without being heard. It was said in *Bagg's* case, 11 Co. 99, by one of the judges—a judge of great authority—that it is contrary to law that a person should be punished without being heard; and how can a man be heard without being summoned and having the opportunity of being heard? I think it is contrary to natural justice, and contrary to the spirit of many written laws of this country, and it certainly is contrary to the general spirit of the common law of this country. Now the general principle is well established, and the question is, is there anything to take this case out of it? There is certainly nothing in the express provisions of the Act to do so. It has been sought to find an analogy between this and the case in which, under the statute of Victoria, a person may be held to bail by a judge's order, if it appear that he is about to leave the country. There he is not committed in execution—only committed till he finds bail; but as it appears likely to infringe upon the general rule that a man shall not be deprived of his liberty unless he have an opportunity of showing cause, it looks as if the preventing fraudulent persons from flying the country is an object of sufficient weight to justify a departure to the extent to which there is a departure from the general principle, that a man's liberty shall not be taken away without a power of being heard. In that case, a power is given by the statute; and it is in general terms. There is no mistake as to the Act itself; it is founded on the general and important principle of law to which I have been adverting. In that case there is a power given, that if a person is taken under such a warrant, and he does not choose to give bail, he may instantly apply to any judge, and may require that he should be forthwith discharged, and may get satisfaction if he has been improperly taken. That is a qualification that shows how watchful the Legislature was when dealing with any power, however it might think it necessary to give that power, if it was giving a power likely to be exercised in derogation of the rights of the subject to freedom from imprisonment. Now, in this Act of Parliament there is nothing of the kind. There is a power given by the Act, that a person may, if he thinks fit, summon his debtor to appear before the Court, and show cause why he should not be forthwith discharged; but the only way in which he can get out of any special provision of this Act is by paying the debt and the costs. Now, supposing it was found to be necessary, and Mr. Petersdorff did not deny it, to have a second inquiry, the warrant cannot issue, or an inquiry take place on the warrant; but there must be a second inquiry *ex parte*, or otherwise. Supposing the statute was to have that construction, what a strange consequence would result; an *ex parte* inquiry is to be instituted—that is to say, the commissioner shall have the power to inquire on affidavits made on the part of the plaintiff, showing delinquency on the part of the defendant, and to commit the defendant in

execution by way of punishment for that delinquency. I conceive he should not have the power of committing a person to prison in that way, without he have the opportunity of first calling upon the person who had put him in prison and of showing that what he had stated was entirely a mistake. For instance, under the circumstances, where it is stated he has the means of payment, suppose he is able to show that he had some means, but not the complete means; and in that case it is all a mistake to suppose he should be able to show to the satisfaction of the plaintiff himself that he had no means of payment, according to the construction contended for at the bar. However, we are bound to keep to the general principle of the statute; and if, on looking at the statute strictly, we do not find that it by any means excludes the defendant's being heard before he is imprisoned, I think the general principle must apply. It will be observed, that the means of the defendant to pay by instalments is the thing to be inquired into—not expressly mentioned to be inquired into, but impliedly and by necessary implication. If, then, that is to be inquired into by the commissioner on affidavit, it might afford some argument for showing that a prior inquiry only was meant, and that the affidavit of the plaintiff only was meant, because that was mentioned and nothing else; and if nothing was mentioned, and no inquiry is excluded, then the inquiry must be left to implication. In this case we have nothing to do but to apply the general principle, that a party has a right to be summoned to show cause, and that he ought to have a proper summons for the purpose.

CRESWELL, J.—I am of opinion that this rule must be discharged. It is not necessary now to express any opinion as to whether the commissioner before whom the party was brought in the first instance might or might not have committed him, having ordered him to pay by instalments, for default. Although there has been a very strong argument urged at the bar, and a great deal may be said on all sides, it is sufficient for the purpose of this case to say, if the commissioner had such a power, he has not exercised it; he has made an order to pay without entering into any inquiry as to the means, or as to the intent of the party refusing to obey the order. It appears that, default having been afterwards made, without any notice or any opportunity of appearing before him at all, or of obtaining any cause why, the defendant has been committed. There may have been no wilful default, because it appears from the case he had no means of any kind, real or apparent, to pay at the time the order of commitment must have gone. It is impossible to say that the judge had not a judicial act to do, and that he was not to adjudicate on the amount of punishment to be imposed; he was certainly bound to inquire, and the party should have had an opportunity of urging what he might have to say in self-defence. On these grounds I think the commitment bad, and that the prisoner must be

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Discharged.

HERTFORDSHIRE.

Hertford, April 10, 1847.

(Before J. H. Koe, Esq.)

CHEEK v. PARK.

Practice—Jurisdiction.

The Court of each district is a distinct Court. Therefore the clerk of one district Court is not precluded by the 29th and 30th sections of the County Courts Act from practising in other district Courts in the same County.

CHEEK
v.
PARK.

HUTCHINSON for plaintiff.

Foster, for defendant, objected to his being heard, on the ground that he was a clerk of the County Court of Hertfordshire, of which the Court at Hertford was a district, and that he was precluded by the 29th and 30th sections of 9 & 10 Vict. c. 95, from being engaged, either directly or indirectly, in any proceeding of the Court.

The JUDGE stated that he considered the Court at Hertford to be a distinct Court.

Foster referred to the title of the summonses which were headed "The County Court of Hertfordshire, at Hertford," to show that the Court consisted of the whole county of Hertfordshire and the parts adjacent, so far as they were included in the district of the same judge.

The JUDGE said that the point had been brought before him with reference to the constitution of the Court, and he had come to the conclusion that the Court was confined to the district of Hertford; and that Mr. Hutchinson, being the clerk of the Court for Barnet, was entitled to appear.

GLOUCESTERSHIRE.

Cheltenham, April 20, 1847.

(Before JAMES FRANCILLON, Esq.)

GRAY v. GILES.

Jurisdiction.

This Court has no jurisdiction over judgments obtained in any Courts but those "held by virtue of this Act, or under any Act repealed by this Act." Consequently a summons under the 98th section cannot issue upon a judgment of the old County Court.

CHESSHIRE, for plaintiff, said this action was brought for 9*l.* 4*s.* 1*d.* being the debt, damages, and costs on an unsatisfied judgment of the County Court of Gloucestershire, under the 98th section, and produced a certificate of such judgment.

GRAY
v.
GILES.

The JUDGE.—The Court has no jurisdiction; it has only jurisdiction in cases of judgments of this Court, and the statutory Courts repealed by the Act. This judgment is not a judgment of "any Court held by virtue of this Act, or under any Act repealed by this Act," and I cannot therefore proceed on it. The County Court of Gloucestershire is a Common Law Court, and is consequently not repealed.

THE SAME POINT HAS ARISEN IN

WESTMORELAND.

Appleby, May 7, 1847.

(Before T. W. INGHAM, Esq.)

RUDD v. DOBSON.

DEFENDANT was summoned on an unsatisfied judgment of the County Court under the 98th section of the Act.

RUDD
v.
DOBSON.

His HONOUR asked Mr. Wemyss, who appeared (for Messrs. Jackson and Hewitson) on plaintiff's behalf, whether that Court had a statutory or only a common law authority.

Wemyss.—It possesses only a common law power, your Honour.

The JUDGE.—Then this Court has no jurisdiction; the 98th section applies only to the judgments of this Court, and the judgments of any Court held under the authority of statutes repealed by the County Courts Act.

Note.—These cases are reported because their purport appears to have been much misunderstood. They turn entirely upon the construction of the 98th section, which empowers a summons to be issued upon an unsatisfied judgment with a view to punishment by imprisonment for disobedience to the order of the Court. The judgments of all other Courts may be made the foundation of complaints, and used as evidence of the debt.

WARWICKSHIRE.

Birmingham, April 23, 1847.

(Before LEIGH TRAFFORD, Esq.)

COLEY v. WADDELS.

*Particulars—Summons.**On a summons for money lent, plaintiff cannot recover for money expended by him for defendant's use.*COLEY
v.
WADDELS.**S**UMMONS for money lent.—Plaintiff, in person, claimed an account for money lent and money expended by him in the purchase of divers goods for the defendant's use.

The COURT.—You cannot recover for the money expended; you have only summoned defendant for money lent; you should also have summoned him for money paid to his use. It is a mixed claim. I must dismiss the summons; you are at liberty to issue a fresh one.

CARDIGANSHIRE.

Newcastle Emlyn, May 15, 1847.

(Before JOHN JONES, Esq.)

EVANS v. JAMES AND ANOTHER.

*Promissory Note—Consideration—Notice.**Where to an action on a promissory note, the defence is want of consideration, five days' notice of such defence must be given to the plaintiff, although not one of the special defences named in sect. 76.**Sect. 78 empowers this Court to apply the practice of the superior Courts in cases not otherwise provided for.*EVANS
v.
JAMES AND
ANOTHER.**E**VANS, attorney, was proceeding to cross-examine the attesting witness as to the want of consideration for the note.

Lloyd Hall (counsel) objected to this course. No notice had been given to the plaintiff to prove consideration. In the superior Courts such a notice was always required, and of late years that notice was obliged to be put on the record in the shape of a plea.

It would be a great hardship on the suitors of this Court if they were obliged to come prepared, not only to prove the execution of the note, but also its consideration, which upon the trial the defendant might not attempt to impugn.

EVANS
v.
JAMES AND
ANOTHER.

Evans.—By the 74th section all defences (except those specified in the 76th section) may be given by the defendant at the trial in answer to the plaintiff. Want of consideration is not one of the special defences named in the 76th section.

Lloyd Hall.—The rule for giving notice to prove consideration is founded on the principle that, where no such notice is given, the *prima facie* evidence of consideration, arising from the fact of signing the note, is to be held as a conclusive admission on the part of the maker that the consideration was sufficient to maintain *assumpsit*.

The COURT.—I am not bound by the specific rules of practice of the superior Courts, nor by those of the County Court, part of whose jurisdiction has been turned over to this Court. The judges have made no rules upon this point, and nothing is said about it in the Act. By the 78th section, I am to do justice between the parties by applying in such cases the general principles of practice in the superior Courts, according to my discretion. It is very difficult to apply the practice of the superior Courts to this Court, because we have no pleadings here; but the principles of their practice I may apply. I am not to suppose any note put in evidence before me to be void for want of consideration, because it admits on its face to have been made for value received. Therefore, where the effect of such admission is sought to be done away with, I shall hold that notice must be given to the other side; and, adopting the principle of the 17th rule, I shall in all similar cases to the present require the defendant to give five clear days' notice of his intention to dispute the consideration to the party who is to be affected by it, and have such notice proved at the trial. And unless such notice is given, I shall not call on the party to prove consideration, nor allow it to be contested. The better plan will be to adjourn this case, to allow such notice to be given.

Note.—Sect. 78 of 9 & 10 Vict. c. 95, after empowering the judges of the superior Courts to form rules for the practice and proceedings of the County Courts, enacts that "in any case not expressly provided for herein, or by the said rules, the general principles of practice in the superior Courts of Common Law may be adopted and applied, at the discretion of the judges, to actions and proceedings in their several Courts." The practice of the superior Courts is to require the defence of "no consideration" to be specially pleaded. The learned judge in this case exercised a very wise discretion, and it would seem from the language of the section cited above, that it will admit of a much wider application than has yet been attempted.

CARMARTHENSHIRE.

Llanelly, May 26, 1847.

(Before JOHN JOHNES Esq.)

THOMAS v. JONES.

*Duty of Clerk—Payment of Money into Court.**No money should be received by the clerk after the expiration of the five clear days before the Court-day.*THOMAS
v.
JONES.

DEFENDANT had paid debt and all the costs incurred prior to the payment into Court, together with the fee for plaintiff's taking the money out, the day before the Court-day.

The COURT.—No money should be received by the clerk of the Court after the expiration of the five clear days before the Court-day.

Plaint withdrawn.

CARDIGANSHIRE.

Cardigan, May 17, 1847.

(Before JOHN JOHNES, Esq.)

ROWLANDS v. GRIFFITHS.

*Practice—Return of Summons.**Summonses in respect of complaints entered after the commencement of twelve clear days, exclusive of Sundays, next before the holding of the then next Court, to be made returnable at the next Court but one subsequent to the entering of such complaints, and not at the then next Court.*ROWLANDS
v.
GRIFFITHS

THIS complaint was not entered in time to effect service.

Lloyd Hall suggested the expediency of making some general rule about the time for reception of complaints, in analogy with the practice of the superior Courts, as to setting down causes for trial. Here the entering the complaint is not only the commencement of the suit, but also setting down the cause for trial.

The COURT.—I have some doubt about my power to make such an order, but the necessity for it is now apparent. Twelve clear days, exclusive of Sundays, would, I think, be sufficient. The clerk shall draw up a general order. *Case adjourned.*

Note.—The following general order was afterwards drawn up:—"It is ordered that summonses in respect of complaints entered after the commencement of twelve clear days, exclusive of Sundays, next before the holding of the then next Court, shall be made returnable at the next Court but one subsequent to the entering of such complaints, and not at the then next Court."

CARDIGANSHIRE.

Cardigan, May 17, 1847.

(Before JOHN JOHNES, Esq.)

LLOYD v. WILLIAMS.

Summons out of District.

This Court will require an application for a summons to issue into another district, to be supported by an affidavit or declaration setting forth the grounds of such application and taken before a judge of the County Court, a Master Extraordinary in Chancery, or a commissioner of a superior Court.

DEFENDANT lives at Aberayron.

By the COURT.—This is not within the jurisdiction of this Court, and no leave has been obtained. The case is dismissed. Leave must be obtained to sue here, and that must be on application grounded on an affidavit or declaration stating the grounds for the application taken before a judge of a County Court, or Master Extraordinary in Chancery, or a commissioner of a superior Court.

LLOYD
v.
WILLIAMS.

Note.—The following general order was afterwards framed:—"It is ordered that application for leave to issue a summons out of the district in which defendant dwells or carries on his business, must be attended by an affidavit or declaration setting forth the causes on which such application is based."

The practice of the Courts varies much as to the manner of issuing summonses out of the district. Some have adopted the same rule as the judge of the Cardiganshire Court. Others are satisfied with a mere statement of the facts when the summons is applied for, and others again permit the clerks to issue such summonses *mero motu*. The subject has been much discussed, and as it is a power that might be employed by unprincipled plaintiffs for purposes of extortion or oppression, it seems to us that its exercise should be guarded by some such assurance *à tous fides* as that proposed by Mr. Johnes. At all events it is desirable that uniformity of practice should prevail as to this point.

CARDIGANSHIRE.

Cardigan, May 17, 1847.

(Before JOHN JONES, Esq.)

LLOYD v. WILLIAMS.

Summons out of Jurisdiction—Entitling Affidavit.

The declaration or affidavit upon which is founded an application for a summons to issue out of the district should be intitled thus:—"In the County Court of holden at . In the matter of a claim of T. L. against D. W. for 10l. for goods sold and delivered."

LLOYD
v.
WILLIAMS.

LLOYD HALL moved, on a declaration under the statute for abolition of oaths, for leave to enter a plaint against and issue a summons to defendant living out of jurisdiction. The cause of action arose in this district, and all the witnesses live in this town, and the expense of taking them to Aberayron, where defendant lives, a distance of twenty-four miles, would be much greater than bringing them to this Court. The application is founded on a declaration *sec. stat.* as there is no cause yet pending, and it is intitled thus:—"In the County Court of Cardiganshire, holden at Cardigan. In the matter of a claim of Thomas Lloyd and Charles Davies against David Williams for 10l. for goods sold and delivered."

The COURT.—Take leave on filing the declaration with the officer of the Court.

Note.—It has been made a question whether the application to issue a summons out of the district is founded upon a plaint first entered, or if it be not a proceeding preliminary to entering plaint. The words of the section 60 are, "that such summons may issue in any district in which the defendants or one of the defendants shall dwell or carry on his business at the time of the action brought; or, by leave of the Court for the district in which the defendants or one of the defendants shall have dwelt or carried on his business at some time within six calendar months next before the time of the action brought, or in which the cause of action arose; such summons may issue in either of such last mentioned Courts." And section 59 enacts, "that on the application of any person desirous to bring a suit under this Act, the clerk of the Court shall enter in a book, to be kept for this purpose in his office, a plaint in writing, stating the names, &c., &c., and thereupon a summons shall be issued," &c. But by section 60, *such* summons (*i. e.* in pursuance of the plaint) shall not issue in the case under consideration without leave of the Court first obtained. This appears to leave no doubt that the plaint must first be entered, and upon that the application must be made for leave that the summons issue into another district.

PEMBROKESHIRE.

Narberth, May 20, 1847.

(Before JOHN JOHNES, Esq.)

TARDREW v. DAVIES.

*Service of Summons.**Service upon the wife at the dwelling-house is sufficient if it be shown that the husband is in the habit of returning home at night.***T**HIS was a case adjourned from the last Court.
Lewis for plaintiffs.TARDREW
v.
DAVIES.

Cozens for defendant's wife, submitted the facts to the Court. The wife received the summons ten days before the last Court. Defendant was out at the time, and being in greatly reduced circumstances, when he returned home, he was in so low and desponding a condition, that she was afraid to mention the subject to him. The next day defendant left his house in search of employment, without knowing any thing of the summons. His wife did not know where to send to him, and all she knew about him from that time to the present was, that about a fortnight ago she had received a letter from him, dated at Liverpool, but giving no address to which she could send a letter for him. She had been informed by a neighbour who came in the vessel with him, that defendant had left Liverpool a day or two after the date of that letter, in the steamer for Bristol, and she knew nothing more of his movements, nor where he was at this time.

Defendant's wife having been sworn, and proved this statement,

The COURT.—On the question of service on a wife at the dwelling-house, generally, it seems to me sufficient if the husband is shown to be in the habit of returning home at night. In this case at the last Court I did not consider the service sufficient, and therefore adjourned it. If, during a month's adjournment the wife, having power to give or send the summons to her husband, does not do so, but keeps it locked up, it would be a defeating of justice by a trick which could not be allowed. I think I cannot hear this case now, because of the inability of the wife to send the summons to her husband; but it is a fit case to lay before the judges, that they may reconsider the 11th rule of practice, as it appears to me to open the door to great fraud.

Note.—The rule as to service requires revision. It should not be necessary to prove that the summons actually came to defendant's hands. It should be sufficient to satisfy the Court by evidence that defendant in all reasonable probability had obtained a knowledge of it.

PEMBROKESHIRE.

Narberth, May 20, 1847.

(Before JOHN JOHNES, Esq.)

WILLIAMS v. BOWER.

*Practice—Plaint—Nonsuit.**Striking out plaintiff for nonappearance of the parties has the effect of a nonsuit, without costs.*WILLIAMS
v.
BOWER.

NEITHER plaintiff nor defendant appeared.

*Plaint struck out.**Lloyd Hall* asked his Honour what was to be done to have the plaintiff restored to the list?

The COURT.—It is struck out of the plaintiff book, as appears to me. No cause list is mentioned in the Act. Striking out of the plaintiff book is, I think, an end of the case; and I think I was wrong at Cardigan in allowing cases to be reinstated.

Lloyd Hall.—Then it has all the effect of a nonsuit, except carrying costs?

The COURT.—In my opinion, the 79th section means striking out of the plaintiff book, and there is no provision that I see for restoring the plaintiff.

CARMARTHENSHIRE.

Carmarthen, May 24, 1847.

(Before J. JOHNES, Esq.)

THOMAS v. THOMAS.

*Service of Summons.**Service of summons on wife at dwelling-house, insufficient service, the husband having gone to reside elsewhere.*THOMAS
v.
THOMAS.

DEFENDANT had gone to live in Gloucestershire. He was there working, though his wife and family remained here.

The COURT.—The proof of the service has not been sufficient. The case must be adjourned. I have taken time to consider this point, which arose at Cardigan, in the case of *Evans v. Augustus* (1 C. C. Chr. p. 2).

CARMARTHENSHIRE.

Carmarthen, May 24, 1847.

(Before JOHN JOHNES, Esq.)

SIMON, GENT. v. WATTS.

Payment out of Court—Costs.

Where plaintiff accepts payment out of Court, and does not give notice thereof to the clerk, and the cause is called on in due course, judgment will be given for the defendant.

THE debt had been paid to plaintiff after service of summons. SIMON, GENT.
No notice had been given to the clerk of the Court. De-
fendant appeared, but plaintiff was not present. WATTS.

The COURT.—Where a plaintiff accepts payment in this way, and does not withdraw the plaint in time, and then on the day of the trial nothing is due to him, the judgment must be for defendant. Plaintiff accepts it in discharge of his claim, and does so at his peril. There is a mode pointed out in the Act of settling the action, but the plaintiff chooses to take the money in another way. There must be
Judgment for the Defendant.

CARMARTHENSHIRE.

Carmarthen, May 24, 1847.

(Before JOHN JOHNES, Esq.)

JONES v. MEYRICK.

Summons into a Foreign District.

The rule which this Court will adopt, with reference to the issue of summonses into a foreign district, will be, that wherever the witnesses are resident in this district, or the costs of trial will be less here than by suing in the district where defendant resides, leave will be given to issue the summons, but not otherwise.

JONES applied for leave to issue a summons into the Pembroke district, on affidavit of the cause of action having accrued in that district.

JONES
v.
MEYRICK.

The COURT.—The principle the Court will act on is this: where the witnesses are generally resident in the district, so that the expenses of the trial will be less by trying here than by taking them all to the district where the defendant resides, the Court will grant the leave, as being less costly and more convenient to the parties, whatever the result of the trial may be.

CARMARTHENSHIRE.

Llandilo, May 27, 1847.

(Before JOHN JOHNES, Esq.)

PROTHERO v. PROTHERO.

*Summons into a Foreign District.**A summons can only issue into a foreign district under sect. 60 by the leave of the Judge himself in Court. It is a judicial act.*PROTHERO
v.
PROTHERO.

THOMAS asked whether a general order might not be made to lodge the affidavits or declarations on which to found applications for summonses out of the jurisdiction, with the clerk of the Court, to avoid the delay and inconvenience of applying to the Court.

The COURT.—The leave must be that of the Judge himself, so I read the 60th section. It is a judicial act of the Court, and I think it must be done in each case by the Judge sitting in Court.

Note.—This is doubtless the right construction of section 60, and the right rule of practice, but we learn that in many of the Courts it has been greatly relaxed, so that summonses are issued into foreign districts as a matter of course on a mere statement to the clerk. The language of the statute is very explicit:—"Be it enacted, that such summons may issue into any district in which the defendant or one of the defendants shall dwell or carry on business at the time of the action brought; or, by leave of the Court for the district in which the defendant or one of the defendants shall have dwelt or carried on his business, at some time within six calendar months next before the time of the action brought, or on which the action arose, such summons may issue in either of such last-mentioned Courts." The language is permissive in both cases, the words "*may issue*" being applied to both. In the first case, the addition of the words "by leave of the Court," to the one class of summonses only, makes that something more is to be done than a mere permission accorded as a matter of course. The Judge is to do a *judicial* act, and he must base this upon a *hearing* either of an affidavit or of the party, and he must satisfy himself that the facts are such as to justify the issue of a summons to a defendant out of his jurisdiction. The practice now generally adopted is that of an application, upon an affidavit or declaration of the merits, and an order that a summons shall issue.

KENT.

Dartford, June 9, 1847.

(Before JAMES ESPINASSE, Esq.)

ANON.

*Officer of the Court—Contempt.**A police constable is an "officer of the Court," by whom a person may be taken into custody for contempt.*

THE wife of the defendant was committed, until the rising of the Court, for insolence to the Judge, and creating a disturbance in the Court. A police constable in attendance was directed to take the defendant into custody. On its being brought to the notice of the learned Judge, he considered the words "officer of the Court," in the 113th section, sufficient to include a police constable.

ANON.

Notes.—Sect. 113 enacts, "that if any person shall wilfully insult the Judge, or any juror, or any bailiff, clerk, or officer of the said Court, for the time being, during his sitting or attendance in Court, &c., &c., it shall be lawful for any bailiff or officer of the Court, with or without the assistance of any other person, by the order of the Judge, to take such offender into custody, and detain him until the rising of the Court, &c." It is singular that the interpretation clause (s. 142) does not refer to the term "officer of the Court." In the absence of such a legislative definition of the term, we must refer to its legal and general meaning. In common parlance a police officer accidentally present would not be an officer of the Court. Looking to the use of the same term in other parts of the statute, there is nothing to show that the Legislature intended to use the term in the wide sense given to it by Mr. Espinasse. In the same section it is used; but would it be held that an insult to such a personage would be an insult to an "officer of the said Court" within the meaning of the section? Could he claim the protection of the Court, as such, or avail himself of the 113th section, which provides that in any suit against any clerk, bailiff, or officer of any Court, the plaintiff shall recover no costs if the verdict be for less than £20? We certainly think not. And, if rightly, with great respect for the authority of the learned Judge, it seems to us that the decision could not be supported.

PEMBROKESHIRE.

Pembroke, June 17, 1847.

(Before JOHN JOHNES, Esq.)

MARTIN v. EVANS.

*New Trial.**An application for a new trial must be made upon an affidavit of the facts, and notice must be given to the other party under rule 21.*MARTIN
v.
EVANS.

LLOYD HALL moved to set aside judgment herein and for a new trial. Defendant was very ignorant, and had on instructed his attorney on the morning of the last court-day, and had not informed him of all the facts of the case. Since the trial defendant had given up the key of the house, in obedience to the order of the Court, and both he and his attorney had been in England, and had only just returned. The grounds for setting aside the judgment were, 1st, that the ignorance of the defendant did not enable him to bring his defence properly before the Court as he expected that plaintiff would have admitted it, instead of denying it, at the trial; 2nd, a variance in the notice to quit. The practice in these matters was not yet settled, and he wished to know whether the Court would require the facts to be stated on affidavit or *vivâ voce*.

The COURT.—An affidavit will be necessary; and, unless the other side waive it, the 21st rule of practice requires notice to be given.

PEMBROKESHIRE.

Narberth, June 16, 1847.

(Before JOHN JOHNES, Esq.)

TARDREW AND ANOTHER v. DAVIES.

*Practice—Return of Summons.**A summons cannot be made returnable generally at "the next Court" at the expiration of ten days from the day of service: some Court must be named.*TARDREW
AND ANOTHER
v.
DAVIES.

THE service of this summons had not been effected. Defendant had not been heard of since he went to Bristol.

Lewis, for plaintiffs, applied to have a summons issued, returnable at the next Court after the expiration of ten clear days from the day of service.

The COURT.—You may fix some court-day certain for the return of the summons; but I do not think we can do what you wish. By the fourth rule of practice the summons must be issued according to the form in the schedule, and that form only provides for a day certain.

PEMBROKESHIRE.

Haverfordwest, June 14, 1847.

(Before JOHN JOHNES, Esq.)

MADDOCKS v. PHILLIPS.

*Practice—Plaint.**This Court has no power to reinstate a plaint after it has been struck out.*

WHEN this case was called on among the adjourned cases, no one answered, and it was struck out.

MADDOCKS
v.
PHILLIPS.

James, for the plaintiff, having afterwards discovered this, applied to the Court to have it reinstated. The suit had been commenced at the last Court, but the service of the summons having been out of the jurisdiction, and no leave having been obtained, the matter was *coram non judice*, and the plaint was accordingly struck out. Leave was then obtained to bring this present plaint, and it was accordingly entered with the assistant clerk. As this was a new plaint it should have appeared with a fresh number, as a new plaint of to-day, but the summons had been issued on the old number, and it had been called on from the adjourned list, instead of from the list of the new plaints. He did not expect this, and was waiting for the new plaints to be called. Under these circumstances he hoped his Honour would allow it to be reinstated.

The COURT.—I cannot mend it. I cannot replace it. I have no power to reinstate it when once it is struck out.

PEMBROKESHIRE.

Pembroke, May 21, 1847.

(Before JOHN JOHNES, Esq.)

PHELPS AND ANOTHER v. LLOYD.

*Withdrawing Plaint—Practice—Costs.**Where plaint is withdrawn, defendant is entitled to his costs.*

THE Statute of Limitations had been pleaded. Plaintiffs applied to withdraw the plaint.

PHELPS AND
ANOTHER
v.
LLOYD.

Lanning, for the defendant, applied for costs. Several witnesses had been subpoenaed for defendant.

The COURT.—Take your costs.

JUDGES' CHAMBERS.

December 8, 1847.

(Before MR. JUSTICE PATTESON.)

NIXON v. JOHNSON.

Attorney—County Courts Act.

An attorney may still sue in the superior Courts of Law at Westminster for business done by him as an attorney, and will be entitled to his full costs of suit, though the amount recovered be less than 20l.

NIXON
v.
JOHNSON.

THIS was an action for work and labour as an attorney, for the recovery of the plaintiff's bill of fees, &c. from the defendant.

The action was tried before the Under-sheriff of Middlesex on the 2nd of December instant, and a verdict found for the plaintiff, debt 15*l.* 7*s.*, costs 40*s.*

The costs were taxed on the usual scale, and final judgment signed. Execution was issued on the 4th of December. On the 6th, Patteson, J. made an order that so much of the judgment and the execution thereon as related to the costs should be set aside with costs. On the 7th the plaintiff took out a summons calling on the defendant to show cause why the above order of Patteson, J. should not be rescinded, the costs to be costs in the cause.

W. S. Cross, S. P. in support of the summons.—The order appealed against would render the judgment erroneous, inasmuch as there would be nothing on the face of the record to explain the grounds upon which the plaintiff had been deprived of his costs. And since the plaintiff would be entitled to the costs if he were within the 128th section of 9 & 10 Vict. c. 95 (the County Courts Act), viz. the section relating to the concurrent jurisdiction of the superior Courts, it is incumbent on the defendant who seeks to deprive the plaintiff of the costs to suggest facts upon the record to show that the plaintiff was not within the provisions of that section. After execution, it is too late for the defendant to apply to enter such a suggestion; and besides, the plaintiff, being an attorney, retained his privilege of suing in the superior Courts, and was entitled to his costs notwithstanding sects. 67 and 129 of the above Act.

Cases cited:—*Board v. Parker*, and *Hodding v. Warrand*, 7 East, 47, 50; *Dyer v. Levy*, 4 Dowl. 630; *Wright v. Skinner*, 4 Dowl. 745; S. C. 1 M. & W. 144; *Willoughby v. Fenton*, 2 Jur. 1041.

Bell, S. P. was heard *contra*.

TESON, J. took time to consider, and after consulting some other judges, delivered his judgment on the 9th of December, stated that he was strongly inclined to think that Mr. Cross ought upon every one of the points taken by him; but that it was unnecessary for him to decide upon any of them except the one because he was clearly of opinion that an attorney plaintiff for business done by him as such attorney, was not within the County Courts Act, and therefore that his former order must stand. The costs to be costs in the cause as prayed for.

Order accordingly.

NIXON
v.
JOHNSON.

COURT OF COMMON PLEAS.

Michaelmas Term, 1847.

TOFT v. RAINER.

Prohibition.

Court cannot interfere by prohibition with the proceedings of a City Court, upon a suggestion that the Judge has wrongly decided a question of law which was within his jurisdiction.

Court will interfere only when the inferior Court acts without or beyond its jurisdiction.

TOFT moved for a rule, calling upon the plaintiff to show cause why a writ of prohibition should not issue to the County Court of Cambridgeshire, held at Cambridge, 9 & 10 Vict. c. 95, forbidding him to proceed further in this. It appeared by affidavits that the defendant was summoned to answer a plaint, claiming a particular sum upon an account for goods sold and delivered; that, upon his appearing, he asked the Judge what he had to say in answer to the plaint, at which he then said that the plaintiff had recovered a judgment against him in the Borough Court of Cambridge for the same debt, and had taken some of his goods in execution, which plea the defendant admitted to be true, but, notwithstanding, the Judge made an order upon the defendant to pay 3*l.* 1*s.* 9*d.* It was stated that the Judge was wrong; that the plea was a good defence to the claim, and was not disputed by the plaintiff. The case was likened to cases in the Spiritual Courts, in which the inferior Courts of Common Law are accustomed to interfere, not when the Spiritual Courts entertain matters altogether foreign to their jurisdiction, but also when they put a wrong construction or interpretation upon Common or Statute Law, or if they require unnecessary proof, such as two witnesses to a fact which is capable of being proved by one; and 5 East, 345, was cited as an authority.

TOFT
v.
RAINER.

TOFT
v.
RAINER.

WILDE, C. J.—There is no point in which it can be said that the Judge of the local Court had not jurisdiction. When the plea was pleaded, he had power to decide whether the plea were good or bad. It was a matter within his jurisdiction, and he was compelled to decide upon the validity of the plea. In ordinary cases, if the Judge of an inferior Court come to a wrong decision, a writ of error may be brought. In this case the power to bring a writ of error is taken away by the statute regulating the Courts. There is no ground for supposing that in the present case there is a remedy by writ of prohibition.

COLTMAN, J.—The cases in the Spiritual Courts are in no respect parallel. The Judges there are not Judges of the Common Law. The Judges of the new County Courts are so.

MAULE, J.—This would be a case for a writ of error if the writ of error were not taken away by the statute. Then we cannot circuitously give the defendant the benefit of a writ of error which the Act of Parliament says he is not to have.

WILLIAMS, J.—This application is founded upon nothing more nor less than a suggestion that the Judge of the County Court was wrong in a point of law. If we were to grant it, we ought, whenever one of these Judges is wrong in a point of law, to issue a prohibition. I am not satisfied that the Judge made any mistake at all; but whether he made a great or a small mistake, or none, the matter was within his jurisdiction, and he was competent to decide it.

Rule refused.

COURT OF EXCHEQUER.

Michaelmas Term, 1847.

SANSOM v. PRICE.

Repeal of former Acts—Suggestion—Costs—Affidavit.

The effect of 9 & 10 Vict. c. 95, ss. 4, 5, 6, is only to repeal in a qualified way the various County Courts Acts specified in the schedule; and, therefore, where an action was brought in the superior Court prior to the County Courts Act coming into operation, but tried afterwards, a suggestion may still be entered to deprive the plaintiff of costs, where, as in the Middlesex County Courts Act, that is the proper mode of proceeding.

An affidavit stating that the plaintiff and defendant were both residing within the jurisdiction of the County Court of Middlesex, and the defendant liable to be summoned thereto, is sufficient, without specifying that the defendant resided within the jurisdiction of the County Court of Middlesex, as limited by the 23 Geo. 2.

SANSOM
v.
PRICE.

THIS was a rule calling upon the plaintiff to bring the *postea* into Court, and file the plea-roll, that the defendant might enter a suggestion to deprive the plaintiff of costs, under the

provisions of the Middlesex Court of Requests Act, 23 Geo. 2, c. 33. The writ had been issued Nov. 16, 1846, and the issue tried Oct. 14, 1847.

Lush showed cause.—The Court has now no power to enter this suggestion, as the 23 Geo. 2, under which it must operate, is repealed. The effect of sects. 5, 6, and 7 is to repeal all the former Acts so far as they relate “to the establishment, or jurisdiction, or practice” of the Courts established thereunder; and also the jurisdiction of “any Court” (sect. 6) relative thereto. It may not have been so intended, but, once repealed, they are as if they never existed. (*Charrington v. Metherington*, 2 M. & W. 228.)

PLATT, B.—Here the repeal is only as to the practice hereafter. In the case you cite, the power to award was gone. This right of the defendant’s depends upon the position of the parties when the action was brought.

Lush.—By holding the defendant entitled to make this suggestion, the Statute of Gloucester will be *pro tanto* repealed. If the local Acts were not repealed when the 9 & 10 Vict. c. 95, came into operation, when were they repealed?

PLATT, B.—Are you aware of the case of *Warber v. Reed*, 11 Jur. 522, where Mr. Justice Wightman held that, under similar circumstances, the Isle of Wight Court of Requests Act was in operation? I cannot distinguish that case, and cannot be expected to overrule it. However, I think it was correctly decided.

Lush then objected that the affidavit was insufficient. It states that the plaintiff and defendant were both resident within the jurisdiction “of the County Court of Middlesex;” but the County Court of Middlesex extends to the whole of the county, whereas the provisions of the 23 Geo. 2 only extend to part. (*Todd v. Emly*, 11 M. & W. 611.)

Jones, contra.—That is *prima facie* sufficient. The plaintiff does not aver, as in *Todd v. Emly*, that, in fact, the cause of action did arise within the excepted district. Even when the suggestion is entered, it may be traversed. (11 M. & W. 760.) The general rule of pleading requires that subsequent statutes must be pleaded by the party seeking to avail himself of them.

PLATT, B.—I think that the 23 Geo. 2 is still in existence for the purpose here sought. It is only repealed in a qualified way by 9 & 10 Vict. c. 95. As to the second objection, I think it is sufficiently answered by the fact that there is no allegation to bring the case within the exception.

Rule absolute.

COURT OF EXCHEQUER.

Michaelmas Term, 1847.

(Before PLATT, B.)

PARKER v. CROUCH.

Costs—Sect. 129 of County Courts Act—Superior Courts.

Until a Court was established under the County Courts Act, so that a plaintiff might have been entered therein at the time of action brought, section 129, which deprives the plaintiff of costs in any action "for which a plaintiff might have been entered under this Act," did not apply. Therefore, where a writ in an action of trespass was issued on the 25th of March, 1847, and plaintiff recovered only 40s. damages, and the County Court for the district was not actually established until after the 25th, although it had been directed to be formed by the Order in Council on the 11th of March,

Held, that the right to sue in the superior Court was not affected by the terms of the 129th section of statute 9 & 10 Vict. c. 97.

PARKER
v.
CROUCH.

IN this case a writ in an action of trespass was sued out against the defendant, and, the trial having taken place, a verdict for 40s. was obtained. The writ issued on the 25th of March in the present year, and declaration was delivered on the 8th of June. On the 9th of August the trial came on, and a verdict passed for the plaintiff with 40s. damages. At the conclusion of the case, the learned counsel for the plaintiff applied to the learned Judge to certify that the case was a proper one to be tried in the superior Courts, but this was refused. A rule had been obtained to deprive the plaintiff of costs, under the 129th section of the County Courts Act.

Petersdorff showed cause.—Even if the application were substantially right, it is wrong in form. (*Forman v. Davis*, 11 M. & W. 730; *Watson v. Quilter*, ib. 706.) A suggestion should have been entered. But the 129th section does not apply here, for the particular Court for the district was not established when the writ issued. There is a certificate of the officers of the Court stating this. He was then stopped.

Bovill, in support of the rule.—Although there might not have been a County Court established expressly under this Act, there actually was a County Court for the recovery of small debts in the district of Kingston at the time. The old Sheriff's Court was a County Court for the recovery of small debts; and the 9 & 10 Vict. merely extended the jurisdiction of that Court as a County Court, with certain amendments and additions. It was an exten-

sion of the jurisdiction of the Common Law County Courts; and her Majesty might, if she thought fit, issue an order in council for the division of each county into distinct and separate districts, with a Judge and officers appointed to each district.

PLATT, B.—The 129th section uses the words “for which a plaint might have been entered *under* this Act.”

Bovill.—Then it is sworn that the Order in Council, putting the Act into operation, was issued on the 15th of March, and the 129th section would therefore apply.

PLATT, B.—It is sworn that this County Court under the Act was not established until after the 25th. I think, therefore, there was no place whereat a plaint could have been entered under the Act.

Rule discharged.

PARKER
v.
CROUCH.

COURT OF EXCHEQUER.

Hilary Term, 1847.

HARRIS v. LAWRENCE.

Costs—Suggestion.

Where an action had been commenced in the Superior Court after the passing of the 9 & 10 Vict. c. 95, but before the day on which the County Court was constituted under the provisions of that statute:

Held, that the 129th section, which enacts that “if any action shall be commenced after the passing of this Act in any of her Majesty’s Courts of Record” for any cause that might have been brought in the County Court the plaintiff should be deprived of his costs, was not applicable to the case in question, inasmuch as there “was no Court holden under the statute” in which the plaintiff could have sued at the time of his bringing the action.

CHARNOCK, for defendant, had obtained a rule requiring plaintiff to show cause “why on payment of 5*l.*, the amount of the verdict recovered in this case, all further proceedings should not be stayed; or why the judgment should not be entered up for the said sum of 5*l.* only, without costs; or why the plaintiff should not bring the *postea* into Court and file the plea roll, so that the defendant might enter a suggestion thereon to deprive the plaintiff of costs, pursuant to the statute 9 & 10 Vict. c. 95, s. 129, for the more easy recovery of small debts and demands in England.” The action had been brought for a sum of 44*l.* for not repairing a house; and only 5*l.* had been recovered. It had been commenced after the passing of the statute 9 & 10 Vict. c. 95, but before the County Court had been established by the Order in Council. The house was situate and both plaintiff and defendant dwelt within the district of the County Court of Middlesex.

HARRIS
v.
LAWRENCE.

HARRIS
v.
LAWRENCE.

Crowder, Q. C., now showed cause.—This application is founded upon the language of the 129th section of the County Courts Act, “if any action shall be commenced after the passing of this Act in any of her Majesty’s superior Courts of Record, for any cause other than those lastly mentioned herein-before specified” (alluding to certain actions in which a concurrent jurisdiction is given with the superior Courts) “for which a plaint might have been entered in any Court holden under this Act, and a verdict shall be found for the plaintiff for less than 20*L.*, if the said action is founded on contract, or less than 5*L.*, if it be founded on tort, the said plaintiff shall have judgment to recover such sum only, and no costs; and if a verdict shall not be found for the plaintiff, the defendant shall be entitled to his costs, as between attorney and client; unless in either case the Judge who shall try the cause shall certify, on the back of the record, that the action was fit to be brought in such superior Court.” The language of the first part of the section must be read in connection with the after part, which qualifies the expression, “*after the passing of this Act,*” by the words “for which a plaint *might have been entered.*” Inasmuch as there was no County Court existing, this was not an action for which a plaint might have been entered.

Charnock, in support of the rule.—It is impossible for words to express more clearly the intent. The plaintiff is to be deprived of costs in an action brought in the superior Court if “commenced after the passing of this Act,” if within the jurisdiction of the County Court. Acts of Parliament take effect from the day of the royal assent given, unless otherwise expressed. (33 Geo. 3, c. 13.) There was no necessity for bringing his action. The plaintiff might have waited.

By the COURT.—There can be no doubt as to the proper construction of the 129th section. The words “after the passing of this Act” are qualified by the subsequent words “for which a plaint might have been entered in any Court holden under this Act.” When this action was commenced there was not in existence “a Court holden under this Act” in which a plaint might have been entered.

Rule discharged, with costs.

COURT OF EXCHEQUER.

Michaelmas and Hilary Terms, 1848.

PEIRCE v. JAMES.

*Jurisdiction—Judgment in the Superior Courts.**Will an action lie in the County Courts upon a judgment obtained in the Superior Courts, quære?**Can such a judgment be proved by an examined copy of the record, or must not the record itself be produced, quære?*

THE plaintiff in this case had obtained a judgment in the Court of Exchequer for 18*l.* 19*s.*, upon which he had brought an action by plaint in the County Court, under 9 & 10 Vict. c. 95. The defendant had pleaded *nul tiel* record, upon which the plaintiff produced an examined copy of the judgment, which was received in evidence by the Judge.

PEIRCE
v.
JAMES.

Naylor moved for a prohibition. It may be stated as a general rule, that inferior Courts cannot try actions upon judgments in the superior Courts. It is laid down in Comyn's Digest, article "Prohibition," A. 1, that a prohibition lies if an action be brought in an inferior Court, upon a judgment in the Court of Queen's Bench, citing an anonymous case in 1 Roll. Rep. 54, where a plaintiff who had obtained a judgment in the Queen's Bench for debt and damages, brought an action upon it in the Court of the Tower of London. The defendant was taken in execution and rescued, and the plaintiff brought an action on the case in the same Court for the rescue. But the Court of King's Bench granted a prohibition. If such is the general rule, is there a special power given to the County Courts by 9 & 10 Vict. c. 95, to entertain such a plaint?

PARKE, B.—You contend, in fact, that this action is not included under the general words of the 58th section, which gives power to the County Courts to hold "*all* pleas of *personal* actions, where the debt or damage claimed is not more than 20*l.*" Is not this a *personal* action?

Naylor.—The jurisdiction of the Court of the Tower of London was quite as extensive as that of the County Courts, and yet a prohibition was granted. "This Court," says Sir E. Coke, (4 Inst. 251) describing the Tower Court, "is holden within the verge of London, before the steward there, by prescription of debt, trespass, and other actions of every summe greater or lesser, whereof you may read in 4 Edw. 4, fol. 36, a. and b."

PIRCE
v.
JAMES.

ROLFE, B.—When that case in Rolle was decided, a feeling prevailed between the different Courts which might have led to proceedings that would not be sanctioned now that no such feeling exists.

Naylor.—Then the 98th section of the County Courts Act empowers a person who has obtained an unsatisfied judgment or order in any Court held under that Act, to proceed by summons upon such order or judgment. There would not have been a provision for such a case, if the Legislature had intended that the County Courts should have jurisdiction generally in such actions.

POLLOCK, C. B.—That section is nothing more than a provision for the enforcement in one County Court of a judgment or order obtained in another.

Naylor.—Then there is another objection. The Judgment Roll of the superior Court is the only evidence of a judgment there recovered, and how is the County Court to have access to it?

ALDERSON, B.—That is certainly a strong point. In an action on a judgment in our own Court we inspect the judgment itself. In an action upon the judgment of a Court of co-ordinate authority, we obtain inspection of it by *mittimus*. There would be great inconvenience in sending the records of the Courts to the various County Courts scattered over the kingdom.

Naylor.—Again, the Legislature has provided for this, by 8 & 9 Vict. c. 127, which gives a summary process before a Commissioner of Bankrupts upon judgments under 20*l*.

ALDERSON, B.—Certainly this case does not seem strictly to fall within those for which the County Courts Act was intended to be a remedy. The judgment being already obtained, the plaintiff has but to issue execution. The object, of course, in the present proceeding is, to enforce in the County Court the imprisonment for debt which has been abolished in this Court.

Rule nisi.

On January 20th, Hilary Term,

Naylor moved to make the rule absolute. No person appearing to show cause,

The COURT.—Without entering into the argument, or deciding the points raised, and simply upon the ground that no cause is shown against it, we must make the *Rule absolute.*

COURT OF EXCHEQUER.

*Hilary Term, 1848.*GWINNE *v.* KNIGHT.*Jurisdiction—Title—Landlord and Tenant.*

Where a statute had authorized the levying of a church-rate for a specific purpose and enacted that the occupier or tenant should pay the rate in the first instance and deduct it from the rent; and that "every such landlord should allow such deduction accordingly, notwithstanding any agreement to the contrary," and a lease was produced having such an agreement:

Held, that this was not a matter "in which the title to any corporeal or incorporeal hereditaments" was in question, under the 58th section of 9 & 10 Vict. c. 95, so as to take an action for the recovery by the tenant from his landlord of a rate so paid out of the jurisdiction of the County Court.

HILL moved for a prohibition against the Judge of a County Court, upon the following facts: An action had been brought in the County Court to recover a sum of 7l. 10s., the amount of rates paid by the plaintiff, a tenant of the defendant, who claimed to be repaid in respect of a certain church-rate which had been levied upon him under the provisions of an Act of Parliament authorizing a rate to be raised for the erection of a church, and in which there was a provision that the rate should be paid in the first instance by the tenant or occupier, who should be entitled to deduct it from his rent, "and every such landlord shall allow such deduction accordingly, notwithstanding any agreement to the contrary." A lease was produced containing an agreement to the contrary, and an objection was taken by the defendant that it was a question of title and fell within the 58th section of 9 & 10 Vict. c. 95, and that the County Court had no jurisdiction to adjudicate on the claim. The Judge of the Court advised the parties to raise the question by the present motion for a prohibition. The language of the 58th section of the County Courts Act was this: "provided always that the Court shall not have cognizance of any action of ejectment, or in which the title to any corporeal or incorporeal hereditaments, or to any toll, fair, market, or franchise, shall be in question." Here the question as to the liability to the payment of the church-rate was raised upon the construction of the lease, whose validity depended upon the title of the lessor, and although the title was not perhaps in fact questioned in this case, it might have been at any stage of it.

GWINNE
v.
KNIGHT.

GWYNNE
v.
KNIGHT.

PARKE, B.—As to the meaning of the statute imposing the rate it merely must be that the landlord is to be liable notwithstanding any then existing agreement to the contrary. It does not go on like the Property-tax Acts to say that every such agreement shall be void. But I do not think this is a case in which an incorporeal hereditament is in question. No question of title was raised in fact, and the language of the 58th section is not, that the Court shall not have cognizance where a hereditament *may* be in question, but only where it *shall* be in question; that is, where it shall be *bonâ fide* raised in the action. Here it was never raised at all.
Rule refused.

LANCASHIRE.

Clitheroe, May 25, 1847.

(Before JOHN ADDISON Esq.)

BROWN v. BALDWIN.

Fees—Jury.

The clerk is entitled only to a single fee for summoning the jury.

BROWN
v.
BALDWIN.

IN this case a jury had been demanded. Plaintiff had applied for and obtained an adjournment on payment of costs of the day.

Robinson, for defendant, called the attention of the Court to a charge of seven shillings and sixpence made by the clerk for summoning the jury which the defendant had demanded, for which he had paid the clerk. He referred to the schedule of fees, in which it appears that the item of charge is,—“Issuing summons for jury, one shilling and sixpence,” and contended that the clerk should only have charged that sum. From the Act it appeared that only one summons for a jury was required, not a summons to each juryman. He referred to the wording of the table, where the word “every” appears in almost all the other items of charge, and contended that if it had been intended to allow the clerk a fee for a summons to each juryman, the table would have said “every summons issued for the jury.”

His HONOUR held that the clerk was only entitled to one fee of one shilling and sixpence.

SOMERSETSHIRE.

Yeovil, June 22, 1846.

(Before J. M. CARROW, Esq.)

CUSTARD v. RENDALL.

*Barrister—Attorney—Practice.**A barrister cannot be heard in the County Court unless instructed by an attorney, under section 91 of stat. 9 & 10 Vict. c. 95.*DONNE, barrister, said, "I appear in this case for defendant."
The JUDGE.—Are you instructed by an attorney?CUSTARD
v.
RENDALL.

Donne.—I am not.

The JUDGE.—Then I cannot hear you.

Donne.—I was going to rely on a part of the 91st section, which says, "or by leave of the Judge."

The JUDGE.—I would not consent to any barrister in England appearing without being instructed by an attorney.

Donne.—Of course I must submit to your decision.

The JUDGE.—Yes; I am quite sure that the Act leaves me no discretion; but if it did, I would not consent to it. The Act says, "that no person shall be entitled to appear for any other party at any proceeding in any of the said Courts, unless he be an attorney of one of her Majesty's superior Courts of Record, or a barrister-at-law, *instructed by an attorney*, on behalf of the party, or by leave of the judge, any other person." But that means any other person but an attorney or barrister. If he is an attorney, he must be a properly qualified one; and if a barrister, he must be a barrister instructed by an attorney.

Donne.—Then no barrister can appear to argue without being instructed by an attorney?

The JUDGE.—No; I think the Act is imperative. If you like to have the case adjourned, in order to be instructed by an attorney, you can.

G. Hancock, attorney, was then retained by the defendant, and duly instructed Donne.

Note.—In every respect this is a most praiseworthy decision of Mr. Carrow. Not only is it in accordance with the letter of the Act, but it adheres to a wholesome rule of the profession, that counsel should be instructed by an attorney in all cases save when called upon by a prisoner "over the bar," as it is termed, or in rare cases of charity in which he protects a poor prisoner *without fee*. There is *no* case in which a counsel is permitted to take a *fee* without the intervention of an attorney, and it is most desirable, that no violation of any rules of professional *etiquette* should be allowed in the County Courts, nor any laxity of practice of any kind. We have placed this case among the present series of reports, in hopes that it may give the tone to future decisions on other questions of professional practice.—E. W. C.

DORSETSHIRE.

Wareham, June 7, 1847.

(Before EDWARD EVERETT, Esq.)

SCUTT v. PHILLIPS.

Costs.

Plaintiff having withdrawn his plaint after receiving notice of special defence, defendant is entitled to his costs up to the period of such withdrawal.

SCUTT
v.
PHILLIPS.

IN this case plaintiff had withdrawn the cause after having received notice of special defence under the Statute of Limitations. The clerk of the Court received notice pursuant to more than five clear days before the court-day, and thereupon communicated such notice to plaintiff.

The JUDGE, however, held that, as the cause was withdrawn without the consent of defendant, he was entitled to his costs at the time of withdrawal, and granted an application now made by defendant's attorney for such costs.

CORNWALL.

Falmouth, June 5, 1847.

(Before G. G. KEKEWICK, Esq.)

ANDREW v. HOCKING.

Costs.

Costs of notice of special defence will be allowed to defendant as the action has been abandoned by the plaintiff, but this Court has no power to direct payment of other costs than the fees of Court, and costs of the application and order. The advocate's fee cannot be allowed in such a case.

ANDREW
v.
HOCKING.

THIS was an action for goods sold and delivered. The defendant gave notice of special defence, viz. that he was an infant within the age of twenty-one years when the supposed cause of action arose. The defendant, when he delivered the notice, paid to the clerk fees to the amount of 1s. 6d.

When plaintiff received notice of the special defence, he immediately served notice on the clerk, and also on the defendant, that the action was abandoned.

At the Court, held May 8,

ANDREW
v.
HOCKING.

Moorman, for defendant, applied to the Court for an order that the costs paid by the defendant to the clerk, and also the advocate's fee, should be paid by the plaintiff, and cited the 88th section of the Act.

Tresidder, jun., plaintiff's attorney, opposed the application, and submitted, that as the action had been abandoned, and notice thereof duly served (three clear days) on the defendant, the defendant had no right to appear at the hearing, and contended that, as the 88th section provided only for *all* the costs of any action or proceeding *in Court*, and that as in the present case there was no action *in Court*, his Honour had no power to make an order for payment of the advocate's fee, or of any portion of it, nor even of the fees paid by the defendant.

His HONOUR said he would take a note of the application, and give judgment next Court.

June 5.

His HONOUR now gave judgment, and stated, that as the action had been abandoned, and there was actually no cause in Court, it was clear the defendant could not appear in Court *for the purposes of the action*. But he was of opinion he had a right to appear there to ask for the costs he had incurred, and ordered that the plaintiff should pay the defendant 1s. 6d. the fees he had paid to the clerk, and the costs of the defendant's application and order; but he considered he had no power to make an order for payment of the advocate's fee, or any portion of it.

Note.—By sect. 88 it is enacted "that all the costs of any action or proceeding in the Court not herein otherwise provided for, shall be paid by or apportioned between the parties, in such manner as the Judge shall think fit, and, in default of any special direction, shall abide the event of the action."

HAMPSHIRE.

Southampton, May 14, 1847.

(Before C. J. GALE, Esq.)

HOLLIER v. WADE.

*Service of Summons.**Where defendant keeps house to evade service of summons, it will be sufficient to nail it on the front door.*HOLLIER
v.
WADE.

DEFENDANT, it appeared, resided near Cowes, and had immured himself in his cottage, setting all bailiffs and writs at defiance.

The bailiff deposed, that not being able to gain entrance, he had nailed the summons on the front door, and he had no doubt that it was with the knowledge of the defendant, who had ventured out once by the front door since.

JUDGE.—As the defendant keeps his door closed to evade the service of the summons, I shall consider this as good service.

Order for payment forthwith.

HAMPSHIRE.

Portsmouth, June 18, 1847.

(Before C. J. GALE, Esq.)

HALL v. BENNETT.

*Particulars of Demand.—Promissory Note.**Particulars of demand are not necessary under rule 5, to be given with a summons in an action for the balance due on a promissory note.*HALL
v.
BENNETT.

THE summons stated this to be “an action on contract for the sum of 7*l*. for the balance of principal money and interest due on a promissory note of 20*l*., dated the 1st of January, 1836, made by defendant, and payable to the plaintiff on demand.”

Field, for defendant, objected that no particulars of demand had been delivered by the plaintiff at the office of the clerk, pursuant to rule 2, or annexed by the clerk to the summons, as required by rule 5; and that the summons was incorrect, as the cause of action exceeded 1*l*. and it did not state “*the particulars of which are hereto annexed*,” according to No. 1 in the schedule of forms; and he argued that it would be desirable to abide strictly by the rules, as it would prevent the inconvenience of an argument being raised on every deviation from them, as to whether or not the irregularity should be allowed.

The COURT.—I do not think particulars are necessary in such a case as this. In an action for an assault, it surely would not be requisite to deliver particulars stating in what parts of the body the blows or kicks were received. There must be some limitation put upon the 2nd rule, and therefore I overrule the objection.

Plaintiff nonsuited: defendant's attorney's fee allowed.

WESTMINSTER.

July 20, 1847.

(Before D. C. MOYLAN, Esq.)

BARR v. REID.

Interpleader—Execution—Rent.

Statute 8 Anne, c. 14, which gives to landlords priority of claim for rent over an execution creditor, is not repealed by the 107th section of the County Courts Act, 9 & 10 Vict. c. 95.

THIS was an interpleader summons under the 118th section of the County Courts Act, the landlord of the defendant, against whom an execution had issued from this Court, having claimed priority of payment of a quarter's rent due to him.

It was contended that the 107th section of the County Courts Act had repealed stat. 8 Anne, c. 14, under which the landlord claimed. After a lengthened argument, which it is unnecessary to repeat, the following judgment was delivered:—

His HONOUR said, This is an interpleader summons under the 118th section of the 9 & 10 Vict. c. 95, for the purpose of bringing before the Court the claim of Mr. Falkner (Reid's landlord) to certain goods and chattels taken by the high bailiff of Westminster in execution under the ordinary process of this Court. Upon the main fact of there having been a quarter's rent due and payable by the defendant to his landlord at the time of the levy, there appears to be no dispute; but the point urged by the high bailiff is, that the statute of the 8th of Anne, c. 14 (which was passed for the express purpose of protecting landlords from pretended or collusive judgments), is in substance repealed by the 107th section of the new Act, and that in the recovery of their respective debts the execution creditor henceforward takes precedence of the landlord. *I do not think such a construction of the law can be at all sustained.* The question is one of extreme importance, and as I am assured that a different opinion prevails in quarters entitled to respect, I feel certainly some diffidence in pronouncing this opinion, although I entertain it without a shade of doubt. I know that creditors, especially in these inferior Courts, are a class of persons fully as much entitled to favour as landlords. Executions here are usually very limited in amount, and little calculated to defraud the landlord of his remedy for his rent. I would therefore

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REID.

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most readily adopt this equitable construction if I thought it at all reconcileable with the letter and spirit of the law. In order, however, to thoroughly understand the question, it is necessary to refer, first, to the statute of Anne, and then to the two sections of the new Act. The words of the 8th of Anne, cap. 14, sect. 1, are these:—"No goods or chattels whatsoever lying or being in or upon the messuages, shall be liable to be taken by virtue of any execution on any pretence whatsoever, unless the party at whose suit the said execution issued out, shall, before the removal of such goods from off the said premises, pay to the landlord all such sums of money as shall be due for rent for the said premises at the time of taking such goods and chattels, provided the said arrears of rent do not amount to more than one year's rent." The 107th section of the new Act enacts, "That so much of an Act passed in the 8th year of the reign of Queen Anne, intituled 'An Act for the better Security of Rents, and to prevent Frauds committed by Tenants,' as relates to the liability of goods taken by virtue of any execution, shall not be deemed to apply to goods taken in execution under the process of any Court holden under this Act; but the landlord of any tenement in which any such goods shall be so taken, shall be entitled (by any writing under his hand, or under the hand of his agent, to be delivered to the bailiff or officer making the levy, which writing shall state the terms of holding, and the rent payable for the same) to claim any rent in arrear then due to him, not exceeding the rent of four weeks, where the tenement is let by the week, and not exceeding the rent accruing due on two terms of payment where the tenement is let for any other term less than a year; and not exceeding in any case the rent accruing due in one year; and in case of any such claim being so made, the bailiff or officer making the levy shall distrain as well for the amount of the rent so claimed, and the costs of such additional distress, as for the amount of money and costs for which the warrant of execution issued under this Act, and shall not proceed to sell the same, or any part thereof, within five days next after such distress taken; and if any replevin be made of the goods so taken, such of the goods shall be sold under the execution as shall satisfy the money and costs for which the warrant of execution issued, and the costs of the sale, and the overplus of such sale (if any), and also the residue of the goods, shall be returned, as in other cases of distress for rent and replevin thereof; and for every such additional distress for rent in arrear, the high bailiff of the Court shall be entitled to have as the costs of the distress, instead of the fees allowed by this Act, for making such distress and keeping possession thereof, the fees allowed by an Act passed in the 57th year of the reign of King George the Third, intituled 'An Act to regulate the Costs of Distresses levied for Payment of Small Rents.'" The 118th section of the new Act, which I will now read, sets forth, "That if any claim shall be made in respect of any goods or chattels taken in execution under the process of any Court holden under this Act, or in respect of the proceeds or value thereof by any landlord for

BARR
v.
REID.

rent, or by any person not being a party against whom such process has issued, it shall be lawful for the clerk of the Court, upon application of the officer charged with the execution of such process, as well before as after any action brought against such officer, to issue a summons, calling before the said Court as well the party issuing such process as the party making such claim, and thereupon any action which shall have been brought in any of her Majesty's superior Courts of Record or in any local or inferior Court in respect of such claim shall be staid; and the Court in which such action shall have been brought, or any Judge thereof, on proof of the issue of such summons, and that the goods and chattels were so taken in execution, may order the party bringing such action to pay the costs of all proceedings had upon such action, after the issuing of such summons out of the County Court and the Judge of the County Court shall adjudicate upon such claim, and make such order between the parties in respect thereof, and of the costs of the proceedings, as to him shall seem fit; and such order shall be enforced in like manner as any order made in any suit brought in such Court." Now it appears to me that the intention of the 107th section and its plain effect is to do away with the *old inviolability* of the tenant's goods. The statute of Anne positively directed that the advance of the landlord's rent should be first made before the creditor could proceed even to remove the goods. Upon this point an erroneous practice has questionless prevailed, for the sheriff first to sell, and then out of the proceeds to satisfy the landlord; this error was pointed out and reprobated by Lord Denman, in the case of *Cocker v. Musgrove and Moon*. Be that as it may, the precedence of the landlord has never been disputed. Under the new law this precedence, or superior right of the landlord, is merely modified, and in cases of small tenancy still further restricted in amount. He must go through certain forms to assert his right. The *onus* of inquiry is no longer on the high bailiff, as it was formerly on the sheriff: the principle of precedence remains quite untouched. If it were not so, why impose upon the landlord the trouble and expense of serving on the high bailiff any notice of his claim for rent? Could it be to secure to him what is already, and must continue to be, his, as long as the rights of property are respected? This would be tantamount to a declaration that the landlord's right to his rent is not to be altogether forfeited; on the contrary, this section is a clear and equitable one, and as plainly expressed as the English language can express it. The 118th section must be taken in connection with the earlier clause. It is in substance a reprint of the 6th section of the 1 & 2 Will. 4, c. 58 (the Interpleader Act), and its purpose, as was that of its prototype, is merely to protect the high bailiff from an action by the creditor if he yielded to the landlord's claim, or by the landlord if he persisted in the execution of the process from the Court. Surely this provision for the adjudication of adverse claims between landlord and judgment creditor would be wholly useless if the construction attempted to be put upon the 107th section could

BARR
v.
REID.

be sustained. On the whole, the question seems to me free from all doubt. The landlord has in this particular case complied with the requirements of the Act as to notice, &c.; the rent for one term of the letting is admitted to be due, and the amount not disputed. The high bailiff has already, it appears, effected a sale of the goods, and the judgment of the Court is, that the quarter's rent be satisfied before any portion of the proceeds be available to the judgment creditor.

PEMBROKESHIRE.

Pembroke, June 17, 1847.

(Before J. JONES, Esq.)

BAILEY AND OTHERS, ASSIGNEES, &c. v. LAYCOCK.

Jury.

Where defendant had demanded a jury, but plaintiff had not, and at the hearing defendant preferred to abandon his demand, but plaintiff objected, and desired a jury:

Held, that plaintiff could not demand the jury unless he also had given notice of such demand.

BAILEY AND
OTHERS,
ASSIGNEES, &c.
v.
LAYCOCK.

THIS was an action of trover, in which the defendant had demanded a jury.

Hall, for the defendant, said, that although he had demanded a jury in this case, he was desirous of abandoning his demand and should proceed without a jury.

Bailey, for the plaintiffs, said that he should not consent to the abandonment; that he was desirous that the cause should be tried by a jury.

His HONOUR asked if the plaintiffs had also demanded a jury.

Bailey said that they had not.

His HONOUR.—The plaintiffs should also have demanded a jury two days before the trial. Having failed to do so, it is not competent for them now to object to the defendant abandoning his demand.

HAMPSHIRE.

Southampton, May 14, 1847.

(Before C. J. GALE, Esq.)

DYER v. COOPER.

*Costs.**Where defendant had left the amount of the debt at the house of the plaintiff during his absence, in the interval between the issuing and service of the summons;**Held, that plaintiff was entitled to his costs.*

THE defendant in this case had taken advantage of plaintiff's absence from his house to call there and leave the amount of debt with the servant, but without the costs, in the interval between the issuing of the summons and the service of it.

Plaintiff now applied to the Court for an order for payment of costs by the defendant, as the attempt to evade them was a trick upon the plaintiff.

HIS HONOUR.—Defendant is liable for the costs from the moment of plaint entered, whether or not the summons be actually served, and this liability can only be waived by the express consent of the plaintiff to accept the debt without the costs. In this case, as surprise has been attempted upon the plaintiff, who has never consented to accept the debt without the costs, *Order made.*

DYER
v.
COOPER.

PEMBROKESHIRE.

Narberth, June 16, 1847.

(Before JOHN JHONES, Esq.)

NICHOLAS v. HANDCOCK.

*Execution—Practice.**Execution will be ordered to issue for each instalment separately.*

MARTIN, for plaintiff, asked for execution herein against defendant's goods for the full amount of debt and costs. The first instalment was payable on the 22nd of May, and had not been paid yet.

THE COURT.—Take execution in a week for the first instalment. I shall adopt the plan that execution shall issue for each instalment separately. If there are two instalments now due in this case, take execution for the amount of both.

NICHOLAS
v.
HANDCOCK.

KENT.

Ramsgate, June 8, 1847.

(Before CHARLES HARWOOD, Esq.)

*Special Defence.**A special defence does not only admit the cause of action, but operates as a plea of "non-assumpsit" or "not guilty."*

JUDGE inquired whether, where a special defence was pleaded the defendant was to be taken as admitting the cause of action, so as to preclude the necessity for the plaintiff producing witnesses to prove his case.

HIS HONOUR.—Certainly I consider the cause of action to be admitted by a special defence, which I take to include the plea of "*non-assumpsit*" or "*not guilty*," as the case may be.

WORCESTERSHIRE.

(Before B. PARHAM, Esq.)

ANDERSON v. MÉRREFIELD.

Summons—Practice.

The omission from the summons of the words "the particulars which are hereunto annexed," as prescribed by the rules, is a fatal informality.

ANDERSON
v.
MÉRREFIELD.

THIS was an action on contract above 5*l*. Boycot, for the defendant, objected to the form of the summons. It did not contain the words "the particulars which are hereunto annexed," as prescribed by the form given in the rules. This was not a mere technicality; it was important that the defendant should be informed where the particulars of the claim against him were to be found, that he might come prepared to meet them.

HIS HONOUR, referring to the rules and the form there given, said that this was certainly something more than a mere error in form; it was a defect in substance. *Summons dismissed.*

DEVONSHIRE.

(Before J. TYRRELL, Esq.)

ROWCLIFFE v. DASCOMBE.

Special Defence—Practice.

Defendant who has pleaded a special defence is yet entitled to go into any other defence which does not require to be specially pleaded.

DEBT for rent. *Special defence*, the Statute of Limitations. *Gillard*, for the defendant, was going into evidence of a different defence from that which had been specially pleaded.

ROWCLIFFE
v.
DASCOMBE.

Riccard, for the plaintiff, objected that it was not competent for the defendant, having given notice of a special defence, to go into other defences.

Gillard contended that he was entitled to do so, provided they were such as were not required to be specially pleaded.

His HONOUR.—I have no doubt about it. The special defence includes the general issue. The defendant has clearly a right to set up any defence he pleases, provided it be not any one of those of which the statute has required notice to be given.

WESTMINSTER.

(Before D. C. MOYLAN, Esq.)

ORCHARD v. NORMAN.

Jurisdiction—Debt—Interest.

An action cannot be maintained for interest due on a debt exceeding 20l. inasmuch as it is necessary to prove the debt in order to establish the claim for interest.

THIS was a summons to recover 15l. being the amount of one year's interest on 300l.

ORCHARD
v.
NORMAN.

Devonshire, plaintiff's attorney, said, some time ago the plaintiff sued the defendant in one of the Superior Courts for the sum of 300l.; but, on examining more closely, the knowledge of the facts appeared to be only between plaintiff and defendant, and consequently he did not proceed to trial.

ORCHARD
v.
NORMAN.

Chambers, defendant's attorney, said, he called upon his friend to prove the debt first, before he took proceedings to recover the interest upon it.

Devonshire.—I feel there is a great deal of difficulty; and it was thought advisable to bring an action in this shape first, so that both plaintiff and defendant might be examined on their oaths before resorting to the sacrifice of reducing the debt to 20*l.* in order to bring it within the jurisdiction of the County Court. Upon the construction of the County Courts Act, I submit, the power to summon is given for interest, supposing that there is an existing debt.

Chambers.—But you must first of all prove that there is a debt. You have failed to prove that 300*l.* is owing, and this Court cannot take cognizance of it. The fact is, your Honour, that in this case an action at law is pending, a Chancery suit has been commenced, and there are also proceedings in bankruptcy.

The JUDGE.—Before I can proceed to hear the case, I must be satisfied that the principal is due. I must first inquire if there is a sum of 300*l.* owing, and that at once ousts the Court of its jurisdiction. If that was established, I think you would be at liberty to sue for interest.

Devonshire.—The plaintiff is ready to swear that the debt is owing to him. We filed a bill in Chancery against the defendant who answered that he never contracted the debt; but I believe the statement of the plaintiff that he did.—We can get no redress from a Superior Court.

The JUDGE.—May I ask if it is with a view of arming yourself with some evidence to recover the principal that you take these proceedings to recover the interest?

Devonshire admitted that such was the object contemplated.

His HONOUR was of opinion that before the interest could be recovered, the debt itself, upon which the interest accrued, must be proved to exist; and as such an inquiry would involve a sum amount beyond the limits of the jurisdiction, the case clearly could not be sustained in this Court, and it must be dismissed with costs.

WARWICKSHIRE.

Birmingham, June 11, 1847.

(Before L. TRAFFORD, Esq.)

EVERETT v. TOD.

New Trial.

In cases where the verdict for the plaintiff is for less than 5l., the Court will, in accordance with the practice of the Superior Courts, as a general rule, refuse a new trial.

A very strong case must be made out to induce the Court to grant such an application.

IN this case the debt was under 5l. Verdict for plaintiff.

Smith obtained a rule to show cause why there should not be a new trial.

EVERETT
v.
TOD.

Hawkes showed cause.—By the Act you have power to grant a new trial where you deem proper, and you have also power to follow the practice of the Superior Courts. In the Superior Courts, the rule adopted by the Judges, in reference to trials before the sheriff, pursuant to writ of trial, where the jurisdiction is confined to debts under 20l., is, that no new trial will be granted where the amount recovered by plaintiff is under 5l. (Archbold's Practice, 13, 15.) Exactly the same reason prevails to regulate the practice in these Courts, which are analogous in the amount to which the jurisdiction extends. In the Sheriff's Courts that reason is, that the amount in dispute is considered too small to justify the expense of a second trial in ordinary cases; though in case of misdirection, or the verdict being against evidence, new trials have sometimes been granted under 5l. I trust your Honour will make it a rule in this Court not to grant new trials where the debt is under 5l.

His HONOUR.—There was a jury in this case. There may be a new trial where the verdict is against evidence, at all events.

Hawkes.—The grounds for the application are purely technical. Besides, in these Courts costs are only allowed once in each case, so that the plaintiff would, in case of a new trial, have to pay the attorney's costs himself. This is an additional reason why there should not be a new trial.

Smith, contra.—I shall show you that great injustice would be done by adopting the rule contended for.

His HONOUR referred to the last clause of the 78th section, and said that it was not compulsory.

EVERETT
v.
TOD.

Smith.—My friend forgets that in the Superior Courts there is an expensive formula to go through; and even with that disadvantage, the rule is not of universal application. But it must be remembered that, under this Act, nearly all the actions will be for debts under 5*l*.; that being the case, if the Legislature had thought it best to exclude new trials in debts under 5*l*. that would have been expressly enacted, as in the instance of excluding jurors in the case of such debts.

His HONOUR.—If the verdict is against evidence, and the justice of the case demands, there should be a new trial. In this case justice has been done. Whenever I sit in this Court, I shall be reluctant to grant a new trial when the amount is under 5*l*. That circumstance will be a strong feature in any case.

Rule discharged.

In another case the same point arose.

ANONYMOUS.

ANONYMOUS.

POWELL moved for a new trial on behalf of defendant. The case had been tried by a jury, who found a verdict for plaintiff for 4*l*. 9*s*. 6*d*. Plaintiff had lent a horse to defendant and afterwards the horse being cast in a mill-dam, defendant sent to plaintiff and proposed that, if he would allow defendant to shoot him, defendant would pay him half his value. The Judge left it to the jury to say whether the plaintiff intended to sell the horse or whether it was a mere question of compensation. The declaration was for goods sold and delivered. The jury found for the plaintiff, and *Powell* now objected that the verdict was against evidence.

Hawkes, for plaintiff.—It is important that this Court should follow the practice of the Superior Courts. The 78th section of the 9 & 10 Vict. c. 95, contemplates this. In those Courts new trials are not granted when the verdict is for less than 5*l*. (*Packham v. Newman*, 1 Cr. M. & R. 585.) Here the verdict is according to the merits, and in such a case a new trial is rarely granted to let in a defence not meritorious. (*Gist v. Mason*, 1 T. R. 84.) The question was properly left to the jury, and they have found that plaintiff intended to sell, and so the verdict is right.

By the JUDGE.—I do not consider I am bound by the practice of the Superior Courts, but may exercise my discretion. (Sect. 78.) I shall always object to grant a new trial when there has been a jury and the verdict is below 5*l*. if I think it is according to the real merits. I have some doubt whether the evidence supported the declaration, but the objection here is merely one of pleading, and therefore I think the verdict ought to stand. *Motion refused.*

CARMARTHENSHIRE.

Llandovery, May 28, 1847.

(Before JOHN JONES, Esq.)

There were twenty cases for trial.

JONES v. PRICE AND ANOTHER.

Practice—Service of Foreign Summons—Fees.

ONE of the defendants lived at Builth, in the jurisdiction of another circuit. The assistant-bailiff there, to whom the summons had been duly sent through the clerk of the Court, had refused to serve it unless his fees were paid in advance. It had been returned unserved.

JONES
v.
PRICE AND
ANOTHER.

Morgan, for plaintiff, applied to withdraw the plaint until something was settled about the service.

The COURT.—I will consider the subject. The schedule of fees on the withdrawal of a case is not clear. I do not think you can withdraw the plaint without the order of the Court for the purpose, but I have a doubt about this. It strikes me that it must be regularly withdrawn; I do not see that there is any power to do this except by leave of the Court.

WESTMORELAND.

Appleby, July 2, 1847.

(Before T. H. INGHAM, Esq.)

BOUSFIELD v. WHITEHEAD.

Fees—Practice.

Where a plaintiff has been nonsuited and the plaint struck out of the list in consequence of his accidental absence, owing to a misunderstanding as to the time of holding the Court, he will be allowed to enter a new plaint without again paying the fee-fund fee.

THE plaintiff not appearing at the last Court, in consequence of some misapprehension that his appearance was unnecessary, was nonsuited, and now applied in person for a new trial, of which application he had given the requisite notice.

BOUSFIELD
v.
WHITEHEAD.

His HONOUR, after referring to the last Court's cause list, said—I find the plaint has been struck out, and I have, therefore, no power to reinstate it and grant a new trial. You can issue a fresh summons, without paying the fee to the general fund.

DEVONSHIRE.

Holsworthy, July 9, 1847.

(Before W. MACKWORTH PRAED, Esq.)

LANE v. HOBBS.

*Particulars of Demand.**The summons was for goods sold and delivered—Particulars were of work and labour done.**Held, that the summons and particulars are connected, and may be used to explain one the other.*LANE
v.
HOBBS.

ASSUMPSIT for 11*l.* the amount of a surgeon's bill. The summons stated the action to be "for medicines and other things administered, applied, and delivered to the defendant," particulars of which were thereunto annexed. The particulars set forth that the action was brought to recover 10*l.* 10*s.* "for surgical attendance on the defendant," and "for medicines and drugs supplied by the plaintiff to the defendant," and "a fee of 10*s.* paid for a consultation."

The plaintiff admitted that he was not an apothecary, and stated that his claim was for surgical attendance alone, in curing a shot wound, and that he had no claim on the defendant for medicines.

Rowe, for the defendant, contended that the statement of the cause of action, "medicines and other things," as set out in the summons, was insufficient. It was clear the plaintiff could not recover for "medicines," as he was not a licentiate of the Apothecaries' Company. He could not recover for *surgical attendance*, for the 75th section provided, that no evidence should be given by the plaintiff of any demand or cause of action, except such as stated in the summons. Surgical attendance could not be included within the words "other things," for if any meaning could be given to such words, they could be only held to include other things *of the like nature* with those before particularized, viz. medicines. With regard to the reference of the summons, "particulars of which are hereunto annexed," these words could not import into the summons, from such particulars, any new cause of action; and in this case the words must be read thus, "particulars of which *medicines* are hereunto annexed."

The JUDGE, however, held that, under Rule 5, the particulars must be considered as forming part of the summons, and that, read together, the cause of action in this case was sufficiently stated.

WARWICKSHIRE.

Birmingham, June 11, 1847.

(Before LEIGH TRAFFORD, Esq.)

ANONYMOUS.

Setting aside Judgment—Laches of Attorney.

The Court will not set aside a judgment obtained in the absence of defendant's attorney, upon payment of costs of the day, without a rule to show cause obtained on production of a satisfactory affidavit.

SMITH applied to set aside a judgment obtained that morning in his absence. He was instructed by defendant that there was a good defence, and he was not aware that the case would come on so early. ANONYMOUS.

HIS HONOR.—I cannot help that; you should have been here.

SMITH.—We are willing to pay the costs of the day.

HIS HONOR.—There is no excuse for you; the Court did not begin business until some time after ten and your case stood second on the list; I cannot grant the application.

SMITH.—I admit there is no excuse, but I hope you will allow me to take a rule to show cause why the judgment should not be set aside.

HIS HONOR.—Yes; if you produce satisfactory affidavits.

WARWICKSHIRE.

Birmingham, June 11, 1847.

(Before LEIGH TRAFFORD, Esq.)

ANONYMOUS.

New Trial.

Where verdict for plaintiff is for less than 5l. the Court will generally refuse a new trial to defendant, in accordance with the practice of the Superior Courts.

POWELL moved for a new trial on behalf of defendant. The case had been tried by a jury, who found a verdict for plaintiff or 4l. 9s. 6d. Plaintiff had lent a horse to defendant, and afterwards, the horse being cast in a mill-dam, defendant sent to plaintiff and proposed that if he would allow defendant to shoot him, defen- ANONYMOUS.

ANONYMOUS. dant would pay him half his value. The Judge left it to the jury to say whether the plaintiff intended to sell the horse, or whether it was a mere question of compensation. The declaration was for goods sold and delivered. The jury found for the plaintiff, and *Powell* now objected that the verdict was against evidence.

Hawkes, for plaintiff.—It is important that this Court should follow the practice of the Superior Courts. The 78th section of the 9 & 10 Vict. c. 95, contemplates this. In those Courts new trials are not granted when the verdict is for less than 5*l*. (*Pac ham v. Newman*, 1 Cr. M. & R. 585.) Here the verdict is according to the merits, and in such a case a new trial is rarely granted to let in a defence not meritorious. (*Gist v. Mason*, 1 T. R. 84) The question was properly left to the jury, and they have found that plaintiff intended to sell, and so the verdict is right.

By the JUDGE.—I do not consider I am bound by the practice of the Superior Courts, but may exercise my discretion. (Section 78.) I shall always object to grant a new trial when there has been a jury and the verdict is below 5*l*. if I think it is according to the real merits. I have some doubt whether the evidence supports the declaration, but the objection here is merely one of pleading, and therefore I think the verdict ought to stand.

Motion refused.

YORKSHIRE.

York, July 26, 1847.

(Before R. WHARTON, Esq.)

WINN v. GUEST.

Jurisdiction—Recovery of Tenement.

*Where a house and land were demised by the same landlord to the same tenant, at an entire rent of 96*l*. but the tenancy of the house commenced at a different period from the tenancy of the land:*

*Held, that they could not be severed for the purpose of suing in this Court for the recovery of a tenement the value or rent of which does not exceed 50*l*. per annum, under sect. 122 of the County Courts Act.*

WINN
v.
GUEST.

THIS was an action to obtain possession of a public-house and gardens, which had been demised by the plaintiff to the defendant, together with a piece of grass land, at an entire rent 96*l*. per annum. But the tenancy to the grass land had commenced on the 25th of March, that of the house and gardens on the 23rd of June.

Anderson, for the defendant, contended that this Court had no jurisdiction, inasmuch as the land and house, being demised at an entire rent, constituted one tenement, and, therefore, the rental 96*l*. took it out of the cognizance of the County Courts.

Wilkinson, contra.

His HONOR.—There is clearly one entire tenement at a rent of 96*l.* and not two distinct tenements, as contended by the plaintiff. There was no proof of severance, and therefore there must be a
Nonsuit, with costs.

WINN
 v.
 GUMST.

Note.—The language of the 122nd section is this: "That when and so soon as the term and interest of any house, land, or other corporeal hereditament, where the value of the premises, or the rent payable in respect of such tenancy, did not exceed the sum of fifty pounds by the year, and upon which no fine shall have been paid, shall have ended, or shall have been duly determined by a legal notice to quit," &c.—*E. W. C.*

BRECKNOCKSHIRE.

Hay, May 27, 1847.

(Before JOHN WILSON, Esq.)

BROMAGE v. WILLIAMS.

Summons—Particulars—Variance.

The particulars must be consistent with the cause of action stated in the summons. Therefore, where the summons claimed a debt for goods sold and delivered, and the particulars were for work done, and costs of a summons, it was held to be insufficient.

ACTION for debt.

Pugh, for plaintiff; *Higgins*, for defendant.

A jury had been demanded.

Higgins objected that plaintiff in his summons claimed debt of 6*l.* 5*s.* on contract: "For to balance of account for goods sold and delivered, work and labour, &c." as per particulars annexed; and the particulars referred to were as follow:—

BROMAGE
 v.
 WILLIAMS.

"Mr. John Williams.

"To Richard Bromage.

"1846. To balance due to me after giving credit for 5*l.* 10*s.* 6*d.* being an account allowed the said John Williams for work done as a painter, &c..... £4 3 0

"To costs of issuing a summons in the Brecon County Court against John Williams, at the suit of the said Richard Bromage, on the 17th day of November, 1846, and for subsequent proceedings taken thereon. 2 2 0

£6 5 0"

BROMAGE
v.
WILLIAMS.

The County Courts Act, sect. 75, prohibits evidence of any demand or cause of action not stated in the summons; and the second rule requires that, in cases above 5*l*. copies of particulars shall be delivered to the clerk of the Court, and he is to annex them to the summons served. The plaintiff, by his summons, only seeks to "recover for goods sold and delivered, and work and labour, &c." and does not in his particulars set forth any work or labour except work done by defendant as a painter, for which he gives him credit; so that the evident effect of the particular and summons together is, that it is not stated for what the balance is claimed; it might be for money lent or expended, or any other undefined cause, to which the summons cannot be held to have an express reference. The particular certainly mentions an account but if the particular contains anything besides goods sold and delivered, and work and labour, it fatally varies from the summons as the summons does not seek to recover on an account stated unless the addition of "&c." be held to do so.

The JUDGE.—You may read the summons as if "&c." was not in it. It certainly cannot be held to mean anything legally cognizable.

Higgins.—Treating, then, the "&c." as surplusage, and looking to the first item of the particular with reference to the summons he relied upon cases directly in point, which had been decided, and especially *Coley v. Waddels* (1 Cox & Macrae, 26), where plaintiff claimed for money lent and money expended, and the summons was only for money lent. The Judge said, "You cannot recover for the money expended; it is a mixed claim. I must dismiss the summons."

His HONOR.—This objection seems well founded. Mr. Pugh how can you get rid of it?

Pugh.—It is a clerical error. I will abandon the second item in the particular, and, the claim being under 5*l*. a particular will be unnecessary.

The JUDGE.—You can't do that; by your summons you claim 6*l*. 5*s*.

Pugh.—Then I move to adjourn the case to enable the plaintiff to amend his particular.

Higgins contended it was too late, and pressed for dismissal of the nonsuit.

The JUDGE.—Here the jury is sworn, and must be got rid of. Mr. Pugh, you might elect to be nonsuited, or have the jury discharged.

Pugh.—Then I must submit to a nonsuit.

Plaintiff nonsuited.

MIDDLESEX.

Brentford, July 13, 1847.

(Before ANDREW AMOS, Esq.)

COPELAND v. SIMMONDS.

*Articled Clerk—Costs—Payment by Instalments—Practice.**Where the attorney is unavoidably absent, the Court will permit an articled clerk, authorized in writing, to state the case to the Court, but not to address the jury.**In such case the costs of an attorney's appearance will not be allowed.**Where defendant appears by attorney and disputes the claim, and thereby puts the plaintiff to unnecessary expense, the Court will not order payment by instalments.*

ON this case being called,
 Mr. *Whitefield*, an articled clerk to the plaintiff's attorneys, said he had to apologize to his Honor for the absence of his principals, a London firm, but neither was able to attend personally, being engaged at the Assizes. The applicant held a written request from his principals, authorizing him, with his Honor's permission, to conduct the cause for the plaintiff, and submitted to his Honor whether he could be heard.

COPELAND
v.
SIMMONDS.

HIS HONOR said the rule he adopted in such cases was to allow gentlemen similarly situated to state their client's cases to the Court, and examine the parties and their witnesses; but when juries were summoned, not to allow them to address the jury.

The case then proceeded.

Sleap, of Ealing, for the defendant.

Ultimately there was a verdict for the plaintiff for the full amount claimed, and costs.

Mr. *Whitefield* applied for the costs of appearance by attorney.

HIS HONOR said that where the attorney did not appear, and under the peculiar circumstances, his clerk was permitted to examine the witnesses, he should not allow the fee.

Sleap, for the defendant, then applied for an order that the debt and costs may be paid by instalments.

HIS HONOR.—No. When a defendant disputes a debt, and even appears by attorney, and does not succeed, I do not think he is entitled to any favor. He has put the plaintiff to unnecessary expense and trouble, and I shall order payment to be made immediately, or execution will issue.

WESTMORELAND.

Appleby, July 2, 1847.

(Before T. H. INGHAM, Esq.)

BOUSFIELD v. WHITEHEAD.

Fees—Practice.

Where a plaintiff has been nonsuited, and the plaint struck out list, in consequence of his accidental absence, owing to a misstanding as to the time of holding the Court, he will be allowed to a new plaint without again paying the fee fund fee.

BOUSFIELD
v.
WHITEHEAD.

THE plaintiff not appearing at the last Court, in consequence of some misapprehension that his appearance was unnecessary, was nonsuited, and now applied in person for a new trial, of which application he had given the requisite notice.

His HONOR, after referring to the last court's cause list, I find the plaint has been struck out, and I have, therefore, power to reinstate it and grant a new trial. You can issue a summons, without paying the fee to the general fund.

KENT.

Deal, August 19, 1847.

(Before CHARLES HARWOOD, Esq.)

WISE v. ARNOLD.

Adjournment—Practice.

Where the defendant is present in Court and applies for an adjournment on the ground of the absence of a material witness, he may state the fact on oath, viva voce, instead of by affidavit.

WISE
v.
ARNOLD.

JUDGE, for defendant, applied to his Honor to know whether a motion for an adjournment should be on oath or affidavit. His HONOR preferred an affidavit sworn in Court.

One was immediately prepared and sworn in Court, stating the defendant's inability to proceed to trial in consequence of the absence of a material witness.

KENT.

Deal, August 19, 1847.

(Before CHARLES HARWOOD, Esq.)

SOLOMON v. RUTLEY.

Witness—Subpœna—Costs.

It will require that a witness shall be served with a subpœna ten days before the trial, otherwise it will not enforce the penalty at him.

LERK of the South-Eastern Railway Company was subpoenaed as a witness, and to produce a packing case. Witness y received his summons on the 17th in the afternoon, and not therefore produce the case in time, it being at the yer's Arms terminus, in London.

HONOR said, that it was desirable to establish some reason for the service of a subpœna, and he considered that ten days' service before the trial would be such. Unless so he should not feel himself justified in inflicting the for non-obedience to it. At the same time it might be as state that he should allow the costs of those witnesses only and been subpoenaed and examined.

SOLOMON
v.
RUTLEY.

It is, perhaps, a mistake of the reporter that represents the learned Judge as giving when the witness has been subpoenaed and examined: more probably he used or use, the negative, and to say or examined, because, however appropriate the rule in case, it would be very unjust in the former. If the witnesses are willing to come subpoena, surely the process should not be required. But to guard against abuse, it right to say that no such witness shall be allowed his costs unless examined. On and, the mere fact of a witness having been subpoenaed, if he be not called, should e the party to his expenses, for it often happens that a number of witnesses are unnecessarily, merely for the sake of the expenses allowed, or to throw a larger the other party. The Courts should be very strict in the allowance of the f witnesses, especially when they are not called.—E. W. C.

GLOUCESTERSHIRE.

Stroud, August 4, 1847.

(Before J. FRANCILLON, Esq.)

CLISSOLD AND ANOTHER v. JEFFERIES.

Interpleader—Landlord's claim for rent—Costs.

*Bailiff had levied. The landlord served notice of claim of 15*l.* for one year's rent. There were other goods in defendant's house, but the bailiff did not make another levy; the proceeds of the sale of the goods seized were paid into Court, and an interpleader summons was taken out by the landlord.*

Held, that after notice of rent due, it is the duty of the bailiff to make a further levy, and that the execution is to be satisfied out of the proceeds of the first levy, and the rent out of those of the second.

Interpleader is no exception to the rule that the costs of litigation should abide the result.

CLISSOLD
AND ANOTHER
v.
JEFFERIES.

AT the July Court was heard an interpleader upon a claim made by Mr. Watts to be paid a sum of money levied under an execution issued in this cause against the goods of the defendant, Jefferies.

It appears that Chandler and Clayfield, two assistant bailiffs of this Court, seized and removed from the defendant's dwelling-house a portion of his goods. Chandler took away the goods in a cart to an inn called the White Horse, leaving Clayfield at the defendant's house. About an hour after the levy, and soon after the arrival of the goods at the White Horse, and while Chandler was there, a notice, signed by the agent of Mr. Watts, was served on Chandler. The notice informed Chandler that the sum of 15*l.* for a year's rent was due to Mr. Watts from the defendant, Jefferies, for the premises occupied by him. Upon receipt of the notice, Chandler returned to the house of the defendant, and showed the notice to Clayfield. Both Chandler and Clayfield then left the premises. They did not seize any other goods of the defendant than those which had, before the receipt of the notice, been removed to the White Horse; and no distress had been made by them, or either of them, for the rent due to Mr. Watts. According to the evidence of Clayfield, the goods left at the defendant's house were of sufficient value to have satisfied the rent due to Mr. Watts; at least such appears to be the opinion of Clayfield; but he did not appear to have carefully valued those goods.

The sum of 6*l.* 2*s.* 10*d.*, now in Court, is the produce of the sale of the goods removed to the White Horse. The execution was issued for a debt of 20*l.* and 3*l.* 3*s.* 8*d.* for costs.

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By the COURT.—At the hearing of this interpleader, the case of *Arnett v. Garnett* (3 Barn. & Ald. 440), was cited. I think the authority of that case might have been conclusive in favour of the present claim, had the statute 9 & 10 Vict. c. 95, establishing this Court, given the landlord, in a case like the present, a priority the same as, or like that, which was given by the statute 8 Anne, c. 14.

The statute of Anne provides, in effect, that no goods on premises for which rent is due shall be liable to be taken by virtue of any execution, unless the party at whose suit the execution is sued out shall, before the removal of the goods from the premises, pay to the landlord the rent due, not exceeding a year's rent; and the sheriff is empowered and required to levy and pay to the plaintiff the money paid for the rent, in addition to the execution money. Thus the claim of the execution creditor in respect of his debt and costs is most effectually postponed to the claim of the landlord in respect of his rent.

In the case of an execution from this Court, the provision of the statute of Anne is in effect repealed by the 107th section of the statute 9 & 10 Vict. c. 95. That section proceeds to provide that in the case of goods being taken in execution by the process of a County Court, and of a claim for rent being made, the bailiff "shall distrain as well for the amount of the rent so claimed, and the costs of such additional distress, as for the amount of money and costs for which the warrant of execution issued under this Act, and shall not proceed to sell the same, or any part thereof, within five days next after such distress taken; and if any replevin be made of the goods so taken, such of the goods shall be sold under the execution as shall satisfy the money and costs for which the warrant of execution issued, and the costs of the sale; and the overplus of such sale (if any), and also the residue of the goods, shall be returned, as in other cases of distress for rent and replevin thereof; and for every such additional distress for rent in arrear, the high bailiff of the Court shall be entitled to have, as the costs of the distress, instead of the fees allowed by this Act for making such distress and keeping possession thereof, the fees allowed by an Act passed in the 57th year of the reign of King George the Third, intituled 'An Act to regulate the Costs of Distresses levied for Payment of Small Rents.'"

The meaning of this very clumsily expressed enactment seems to me to be this: that a levy by virtue of an execution is regarded as a distress, and that, after a claim of rent, the bailiff's duty is to make a second distress for the rent; and that out of the proceeds of the first distress the money for which the execution is issued is to be satisfied, and that out of the proceeds of the second distress the rent is to be satisfied. I therefore think, that as the money now in Court consists of the proceeds of the first, or rather the

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only distress made in this case, the plaintiffs, Messrs. Clissold and Thomas, are entitled to receive it; and that, as it was not raised by means of a second distress, Mr. Watts is not entitled to receive it. So far from a priority being given by the section to a landlord the provision for the case of a replevin shows distinctly the intention of the Legislature that there is not to be any such priority or privilege.

I adjudicate that the plaintiffs, Messrs. Clissold and Thomas, are entitled to the money now in Court, and I order it to be paid to them.

My chief difficulty is as to the costs. As perhaps there might not have been any occasion for these proceedings if the bailiffs had made a second distress, I order that no fees in respect of the interpleader be paid to the high bailiff, or any of his officers. As to the other interpleader Court fees, they are to be paid in the first instance by Messrs. Clissold and Thomas, and are, with the amount of the other interpleader costs, to be paid to them by Mr. Watts. It may be hard that Mr. Watts, not being in fault, should have to pay these costs; but, as between Mr. Watts and Messrs. Clissold and Thomas, it would, I think, be a greater hardship than they, as the successful parties, and not being in fault, should not recover from Mr. Watts, the unsuccessful party, the amount of their costs. In other words, I do not perceive any sufficient reason for making this case an exception from the general rule, that the costs of litigation shall abide the event.

COURT OF QUEEN'S BENCH.

Easter Term, 1848.

LEWIS v. HANCE.

JONES v. SAVAGE.

Privilege—Attorney.

by sect. 67 of the County Courts Act, that "no privilege, hereinafter excepted, shall be allowed to any person to exempt the jurisdiction of any Court holden under this Act." The actions are the Universities and the Stannaries Courts, by sects. 41. And, by sect. 129, it is enacted, "that if any action shall be commenced after the passing of this Act in any of Her Majesty's Courts of Record, for any purpose other than those lastly before specified, for which a plaint might have been entered in the Court holden under this Act, and a verdict shall be found for the plaintiff for a sum less than 20l. if the said action is founded on contract, or more than 5l. if it be founded on tort, the said plaintiff shall be entitled to recover such sum only, and no costs." These sections do not deprive an attorney plaintiff of his privilege in the Superior Courts, and that, therefore, he is entitled to sue in an action commenced by him in the Superior Courts, where he might have sued in the County Court. The language of the 67th section does take away the privilege of an attorney to be sued in his own Court.

cases rules had been obtained to show cause why a writ of prohibition should not be entered, to deprive the plaintiffs of costs, the actions having been brought by them in the County Courts when they were within the jurisdiction of a County Court. In Hilary Term cause was shown by the plaintiff on behalf of one plaintiff, and Miller, on behalf of the other. It was contended that the County Courts Act does not deprive an attorney of his privilege to sue in his own Court. It has been held that a privilege can only be taken away by express words, and not by implication. The 67th section of the County Courts Act provides that "no privilege shall be allowed to any person to exempt his jurisdiction of any Court holden under this Act." It is contended that the action should be brought within the jurisdiction to be within this provision does not substantially differ from that in the County Courts Act, s. 3, c. 104, s. 12, under which it was held, in *Board v. East*, 46), that an attorney plaintiff did not lose his privilege and was not bound to sue in the Court of Requests or the County Court. So upon the 23 Geo. 2, c. 33, s. 2, the Middlesex County Courts Act, which used even stronger terms, it was held, in *Jordan*, cited in a note to *Wiltshire v. Lloyd* (1 Doug.

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381), that the privilege to sue was not taken away. *Johnson v. Bray* (2 B. & B. 698), and *Willoughby v. Fenton* (2 Jur. 5), were to the like effect. They cited also *Gerard's case* (2 W. Black. 1123, 1129), *Dyer v. Levy* (4 Dow. 630), *Burn v. Pasmore*, in a note to *Elkins v. Harding*, (1 C. & J. 346.)

Creasy, for defendant Hance, contended that the beneficent objects of the statute would be materially defeated if it were held that an attorney is to be privileged to put defendants to the greater costs of an action in the Superior Courts, especially where, as in the case of a note or bill of exchange, an indorsement to him would enable him to evade the County Courts Act to an unlimited extent. The origin of the privilege was the supposed necessity for the personal presence of the attorney in his Court: (Com. Dig. "Attorney," B. 3, citing Reg. Gen. in C. B., M. T. 1634.) But that which was once a reality is now a fiction, and *cessante ratione cessat et ipsa lex*. Lord Ellenborough's famous *dictum* as to the privilege of an attorney, upon which so much had been said (*Board v. Parker*, 7 East, 47), is founded upon a decision on the Middlesex County Courts Act (23 Geo. 2, c. 33, s. 4), which enacts, that "no person shall be liable to be summoned to the County Court who was not so before," and *Gardner v. Jessop* (2 Wils. 42), and *Wright v. Skinner* (1 Mee. & Wel. 144), were decisions on the same Act; but the words of that section manifestly apply only to defendants. So that 39 & 40 Geo. 3, c. 104, expressly subjects attorneys to the jurisdiction of the Court as defendants, and upon this *Board v. Parker* (7 East, 47), was decided. But the words of the County Courts Act are much wider than either of these. It enacts, that no privilege shall be allowed to *any person*, and therefore including alike plaintiffs and defendants. This distinction applies to every other statute upon which similar constructions have been put. The rule for reading an Act of Parliament is well stated by Parke, B. in *Becke v. Smith* (2 Mee. & Wel. 195.) "It is a very useful rule," he says, "in the construction of a statute, to adhere to the ordinary meaning of the words used, and to the grammatical construction, unless that is at variance with the intention of the Legislature, to be collected from the statute itself, or leads to any manifest absurdity or repugnance, in which case the language may be varied or modified so as to avoid such inconvenience, but no further." See also *Perry v. Skinner* (2 Mee. & Wel. 471.)

Cur. adv. vult.

JUDGMENT.—May 1.

The judgment of the Court was now delivered by

LORD DENMAN, C. J.—In the case of *Lewis v. Hance*, the question is whether an attorney plaintiff is within the provisions of the stat. 9 & 10 Vict. c. 95, establishing County Courts. By sect. 58 jurisdiction is given in all personal actions where the debt or damage claimed is not more than 20*l*. By sect. 67 it is enacted,

no privilege, except as hereinafter excepted, shall be allowed person to exempt him from the jurisdiction of any Court under this Act;” and the exceptions are the Universities and colleges, by sects. 140 and 141. By sect. 129, it is enacted, “that an action shall be commenced after the passing of this Act, in Her Majesty’s Superior Courts of Record, for any cause other than those last hereinbefore specified” (the present action being one of those specified) “for which a plaintiff might have entered in any Court holden under this Act, and a verdict is found for the plaintiff for a sum less than 20*l.* if the said action is founded upon contract, or less than 5*l.* if it be founded on the said plaintiff shall have judgment to recover such sum only, and no costs.” The present action is on a bill of exchange, and the verdict was under 20*l.* The motion is made to deprive the plaintiff of costs under the 129th section. It is clear that the Comity of Process Act (2 Will. 4, c. 39), which takes away the writ of attachment, has not altered the right of an attorney, who is obliged to sue by summons: (*Dyer v. Ley*, 4 Dowl. and other cases.) It seems equally clear that the 129th section would not of itself deprive an attorney plaintiff of his right to sue in any Superior Courts without the risk of losing costs. The language of that section is not at all stronger than that of the 39 & 40 Geo. 3, c. 104, s. 12:—“If any action shall be commenced in any Court other than the said Court of Requests for any debt not exceeding the sum of 5*l.* and recoverable by the plaintiff by this Act in the said Court of Requests, the plaintiff shall not, by reason of a verdict for him, have or be entitled to any costs whatever,” under which Act it was held, in *Board v. Parker*; 10 Dowl. 47, that a plaintiff attorney did not lose his privilege and was bound to sue in the Court of Requests, or lose his costs if he sued elsewhere. Nor are the words so strong as those in the 10 Geo. 3, c. 29, s. 3, on which *Dyer v. Ley* (4 Dowl. 630), turns; for it was provided “that no action for any debt recoverable by this Act shall be brought, commenced, or prosecuted in any of His Majesty’s Courts at Westminster, or in any other Court whatsoever elsewhere out of the said Court of Requests,” &c.; and it was held that the words did not apply to “an attorney plaintiff,” and was therefore not within that Act. So, by 23 Geo. 2, c. 33 (Middlesex County Courts Act), sect. 19, it is enacted, “that no action of debt or action of *assumpsit* shall be commenced and prosecuted in any of His Majesty’s Courts of Record at Westminster, and the defendant, at the time of such action being brought, shall be liable to be summoned to the said County Court, and on the trial shall find damages under forty shillings, and in such case no costs shall be awarded to the plaintiff, but the defendant shall be entitled to double costs of the suit,” yet an attorney plaintiff was held not to be within the Act: (*Hussey v. Bishire* v. *Lloyd*.) Doug. 381. *Johnson v. Bray* (2 Brod. & 698), is to the same effect under a similar Act; and also

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Willoughby v. Fenton (2 Jur. 1041.) In all these cases the d was recoverable in a Court created by the Act, and in which plaintiff might have sued if he pleased. Yet, by reason of privilege as an attorney, he was held not to be bound to do. Unless we overrule all these cases, we cannot hold the 121 section of the County Courts Act, *per se*, to subject the plaintiff be deprived of the costs of the suit. But the 67th section is relied on, which undoubtedly takes away the privilege of the attorney a defendant; for it enacts, "that no privilege shall be allowed any person to exempt him from the jurisdiction of the County Court." It is contended, these words are large enough to embrace the obligation of a plaintiff to sue, as well as the liability of defendants to be sued. In the Middlesex County Courts Act, there is no such clause; therefore an attorney, whether plaintiff or defendant, has been held not to be within that Act. In the other Acts on which cases cited have turned, there is such a clause. In the 39 & 40 Geo. 3, c. 104, s. 10, it is enacted, "that no privilege shall be allowed to exempt any person from the jurisdiction of the said Court of Requests, on account of his being an attorney, solicitor; and all attorneys and solicitors shall be subject to the several processes, orders, judgments, and executions of the said Court of Requests, in the same manner as any other person." The Court, in *Board v. Parker* (7 East, 46), held these words to be applicable only to defendants. The 67th section of the County Courts Act is in the same language as the early part of the 10 section of 39 & 40 Geo. 3, c. 104, but the subsequent words about processes, &c. are not inserted, and the Court, in *Board v. Parker*, commented on those latter words, although undoubtedly that decision does not appear to turn on them. A debtor, when sued in a County Court, is at once placed under its jurisdiction, to the abolition of any privilege which would otherwise exempt him from it. But it is difficult to see how a creditor, who does not choose to sue in that Court, though he may do so, but who chooses to sue in a Superior Court, as he still may at peril of costs, can be said to be within the jurisdiction of the County Court. That Court cannot in any way punish him, nor call him to account for not suing in the County Court, nor exercise any sort of jurisdiction over him as to costs otherwise, when he sues in any other Court. He requires a privilege to exempt him from the jurisdiction of the County Court, for he never was within its jurisdiction; therefore the abolition of any privilege he may have cannot affect his position as regards the jurisdiction. It is true an unprivileged person suing in a Superior Court, when he might have sued in the County Court, is liable to forfeiture of costs, but that is by reason of the enactment in the 129th section, and not of the 67th section, and which does not prevent creditors from suing who choose to do so. If the words of the 67th section had been "no privilege shall be allowed to any person to exempt him from the provisions of this Act," or in similar words, they would, no doubt, have embraced plaintiff attorneys, but the words are "from the jurisdiction of the County Court."

Court," that is, being exempt from having power exercised over him by the County Court. It is plain the County Court cannot exercise any power over any creditor, privileged or unprivileged, who refuses to sue in that Court. Neither of the sections *per se* affects an attorney plaintiff suing in a Superior Court. Can we, then, apply the 67th section to the 129th, and say that, reading them together, the Legislature clearly intended to take away the privilege of an attorney plaintiff and subject him to the risk of costs if he sue in a Superior Court, where he might have sued in the County Court? We think we cannot, and that, however desirous we may be that attorneys should be subjected to that risk like all other plaintiffs, the Legislature has not so said, even if it so intended.

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Rule refused.

COURT OF EXCHEQUER.

Easter Term, 1848.

GRIMBLEY v. ATKROYD.

Splitting Demands.

The 63rd section of the County Courts Act (9 & 10 Vict. c. 95), enacts, that "it shall not be lawful for any plaintiff to divide any cause of action, for the purpose of bringing two or more suits in any of the said Courts, but any plaintiff having cause of action for more than 20l. for which a plaint might be entered under this Act, if not for more than 20l. may abandon the excess, &c." Held that the term "cause of action" does not mean a cause of action on one single entire contract, but should be interpreted "cause of one action."

In an action on a tradesman's bill, although each item of goods supplied or work done constitutes a separate contract, so that after the stipulated price becomes due the tradesman could sue for one item, yet the understanding is, that it shall be united with other items to form one entire demand.

Held, therefore, that the 63rd section applies to the case of a tradesman's bill, in which one item is connected with another in this sense, that the dealing is not intended to terminate with one contract, but to be continuous, so that one item, if not paid, shall be united with another and form one entire demand.

But, semble, that the term "cause of action" will not extend to cover all contracts executed, however dissimilar in character, which, according to modern practice, could be included in one indebitatus count.

Whether this Court could interfere by prohibition where the total sum due, being under 20l., was wholly within the jurisdiction of the County Court, although several plaints had been brought upon the several items, *quære?*

Quære, also, in what manner the fact of the abandonment by a plaintiff

of the excess above 20l. upon any claim, as provided by the section, should be made to appear upon the proceedings of the Court so as to relieve the defendant from future liability for such excess abandoned?

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ATKROYD.

MARTIN obtained a rule in Michaelmas Term last to cause why a prohibition should not issue to the Judge of the County Court of Worcestershire, upon the following facts:—defendant was a railway contractor, employing a sub-contractor who employed a great number of labourers, paying them partly in money, partly in tickets or orders for goods, in the following:—

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Mr. Grimbley, let the bearer have goods to the amount of (shillings.

Chadwick & Edwards

Upwards of 3,000 of these tickets had been presented to the plaintiff, who was a grocer, and who, at the request of the defendant, supplied the workmen accordingly, and the sub-contractor settling with the men every Saturday, deducted the amount of the orders as money paid to them. In September, 228 complaints were issued by the plaintiff against the defendant in the County Court at Shipston, for so many of the orders supplied by him upon the tickets above set out. One of them came on for trial, and the plaintiff obtained a verdict for his claim and costs, which amounted to £100, and it was stated that this would be the average amount of £100 on each complaint, if it were proceeded with.

Whitehurst and Pigott now showed cause.—The single question in this case is, has the County Court jurisdiction? It is asserted that it has not, because a cause of action of larger amount than £100 has been divided, without abandoning the excess, as provided by 63rd section of the County Courts Act, so as in fact to bring a particular item within the jurisdiction of the Court, and virtually to defeat the plain intention of the Legislature, was to limit that jurisdiction to subject-matters not exceeding £100 in value. The question turns on the construction of the 63rd section of the 9 & 10 Vict. c. 95, intituled “An Act for the more easy Recovery of Small Debts and Demands in England.” The 63rd section enacts, that “it shall not be lawful for any plaintiff to divide any cause of action for the purpose of bringing two or more causes of action in any of the said Courts, but any plaintiff having cause of action for more than £100, for which a complaint might be entered under the Act if not for more than £100, may abandon the excess, and thereupon the plaintiff shall, on proving his case, recover to an amount not exceeding £100 and the judgment of the Court upon such complaint shall be in full discharge of all demands in respect of such cause of action, and entry of the judgment shall be made accordingly.” And by the 90th section it is enacted that “no complaint entered in any Court holden under this Act shall be removable from the County Court into any of Her Majesty’s Superior Courts of Record

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any writ or process unless the debt or damages claimed shall exceed 5l. and then only by leave of a Judge of one of the said Superior Courts, in cases which shall appear to the Judge fit to be tried in one of the Superior Courts, and upon such terms as to payment of costs, giving security for debt or costs, or such other terms as he shall think fit." It is contended, on the other side, that this is all one debt, one contract, and therefore one cause of action. The onus of proof is thrown upon the party moving the prohibition; they must show clearly that there is no jurisdiction, and that the goods were supplied under one contract. If the plaintiff had in fact several causes of action, it would be extremely unreasonable to compel him to blend them and bring his action in the Superior Courts for the whole. He has, or believes that he has, some advantage in the County Court, of which he should not be lightly deprived. [ALDERSON, B.—One advantage which he certainly has by this proceeding is, that he can recover this sum of 300l. on his own oath in the County Court, though he could not in the Superior Courts. POLLOCK, C. B.—It is impossible not to see that the proceeding was a gross abuse of an Act which was passed for the declared purpose of conferring a great benefit on the public at large. PARKE, B.—The simple question for the Court appeared at that moment to be, whether these contracts were within the meaning of the words "cause of action," in the County Courts Act.] In *Rez v. The Sheriff of Herefordshire* (1 B. & Adol. 672), A. became indebted to B. in a sum not exceeding 40s. for the carriage of a parcel of goods, and in a month afterwards incurred another debt to B. not exceeding 40s. for the carriage of a second parcel. A. brought two actions in the County Court for the respective debts. It was there held that the causes of action were distinct, and that A. was entitled to sue separately for each demand; and the Court of Queen's Bench refused a prohibition. *Girling v. Alders* (1 Vent. 73), and an *Anonymous* case (1 Vent. 65), were then cited to establish that "if there be several contracts between A. and B. at several times for several sums, each sum under 40s., and they do all amount to a sum sufficient to entitle a Superior Court, they shall be there put in suit, and not in a Court which is not of record. And it was so resolved in the case of the *Savoy Court* and *Stamforde* (24 C. 2). Also, it was said, that if a man at divers times steal things, all which amount to above 12d., it is a capital felony." But this latter *dictum* is clearly erroneous. There appeared at the end of that case this note:—"If there be *one entire contract* above 40s., and a man sues for it in a Court Baron, severing it into divers small sums under 40s. a prohibition shall be granted, because this is done to defraud the Court of the King: (19 Hen. 6, 54)." In N. B. p. 46, letter A., it is said, that "if a man sue another in the County Court for debt or chattels which do amount to the sum of 40s., then the party shall have a prohibition, &c. And so if the executor sueth in the county or in a Court Baron for a debt of five marks by divers plaints, whereas the debt is upon a contract or upon an obligation; now the defendant may

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show the same, and plead unto the jurisdiction of the Court, he may have a writ of prohibition directed unto them that suriouse, &c." Again, the case of *Hamblin v. Hamblin*, on the Irish Civil Bill Act, 36 Geo. 3, c. 25, s. 8, which enacts that "cause of action still subsisting, and on the whole amounting a sum beyond such sum as is made according to the nature of the case recoverable by force of this Act, shall be split or divided as to make the ground of two or more different actions, in order to bring such cases within the jurisdiction created by this Act. There A. had lent B. a sum of money, and afterwards another sum, and it was held that A. might maintain separate actions for each. Suppose there were several contracts of 19*l.* each, what would be the plea in such a case? [POLLOCK, C. B.—The case you have cited from Barn. & Adol. was that of a rule being refused in the first instance. It is much more satisfactory when a case has been fully discussed and argued, and is of better authority than when the rule has been refused without it. PARKE, B.—Try it by analogy to the old County Courts Act; the first case in *Ventris* seems good for little, and the second is overruled. *Keeble*, 617, was referred to; and the 142nd (interpretation clause) of the Act: there it is said, every word importing the singular number shall, when necessary to give full effect to the enactments therein contained, be understood to mean several persons or things as well as one person or thing, the affidavit on which the rule had been moved was insufficient, as it ought to be clearly shown that the Court had no jurisdiction. These goods were not supplied upon one order; one order generally was first given, and the orders were subsequently given by sub-contractors, men working under Aykroyd, the defendant. Suppose a sum of 15*l.* to be due upon a bill of exchange, and 15*l.* due for rent, could there not be a separate plaint for each? [PARKE, B.—The question was whether if a man had a claim even for 19*l.*, or any other sum, it would be allowed by the 63rd section of the County Courts Act to split it into one hundred different parts? Did the Legislature intend that this should be the effect of an Act which they passed with a view of rendering a beneficial advantage to the public? If a tailor were to receive an order for 10*l.* worth of goods, and also another order of the same party on the same day for 5*l.* worth, and that he were to receive a promissory note for 10*l.*, and another for 5*l.*, even though the whole of these transactions were to happen on the same day, he would have two distinct causes of action, and might sue upon each of the two transactions as two separate causes of action. [PARKE, B.—Surely that could not have been the intention of the Act. Here were two transactions that were for two different articles or lots of articles, the whole amounting to 15*l.*, purchased on the same day. The intention of the Legislature was, that both those sums, for the purpose of an action in the County Courts, should be made the subject of one plaint only. ALDERSON, B.—If that were not so, see what enormous consequences must result even to a man who received his tradesman's

Christmas. One of those bills might be split into one or two actions, and carried into the County Court. Such proceedings tended to bring the law into contempt.] The party who does so might act very unwisely, very indiscreetly, and very improperly, perhaps, but that would be no reason why the County Court should not have jurisdiction to entertain each separate plaintiff's claim. It might be plainer than that each separate purchase—each separate bargain—formed a distinct "cause of action," for which the creditor had a right to sue by a separate plaintiff in the County Court. In the recital of the Act it is stated that there is given to extend the jurisdiction of certain Courts for the recovery of Small Debts to all debts and demands, and all damages arising out of any express or implied agreement, not exceeding £5. By sect. 58 it is enacted, that all pleas of personal action, where the debt or damage claimed is not more than 20*l*., or on balance of account or otherwise, may be holden in the County Court without writ; and at the end of that clause there is a proviso showing of what actions the Court shall not have jurisdiction. The 63rd section is, that a plaintiff shall not divide his cause of action for the purpose of bringing two or more suits. The cause of action was not divided, but the causes of action were several, and each distinct in itself.

See (Hugh Hill with him) contra, in support of the prohibition—The case of *Rex v. The Sheriff of Herefordshire* (1 B. & Ad. 100). There the plaintiff, who was a carrier, had conveyed a quantity of goods for the defendant one day, and in a month or so afterwards a separate and distinct quantity of goods was carried by the defendant for the defendant, and where there were, in fact, two causes of action, each being perfectly distinct debts, the one having no connection with the other, is altogether a different case. In the case of a tenant's bill or the like, or in a tenancy from year to year, the whole debt due might be sued upon the entire debt due; but if a party gave a horse on one day, and sold a horse on another for a sum of money of 20*l*. then he may sue in the County Court separately for each respective debt; but surely not in a case like the present, where an action might have been brought in the Superior Court for the whole amount. The 90th section prevents actions being removed into the Superior Courts, but on certain conditions; and it enacts that "no plaintiff entered in any Court holden under this Act shall be removed or removable from the said Court into any of Her Majesty's Superior Courts of Record by any writ or process, where the debt or damage claimed shall exceed 5*l*., and then only by the order of a Judge of one of the said Superior Courts, in cases where the plaintiff shall appear to the Judge fit to be tried in one of the Superior Courts; and upon such terms as to payment of costs, giving security for debt or costs, or such other terms as he shall think fit." By the 63rd section it is enacted, "that it shall not be lawful for any plaintiff to divide any cause of action, for the purpose of bringing two or more suits in any of the said Courts; but any plaintiff having cause of action for more than 20*l*., for which a

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plaint might be entered under this Act if not for more than 20*l*., may abandon the excess, and thereupon the plaintiff shall, on proving his case, recover to an amount not exceeding 20*l*., and the judgment of the Court upon such plaint shall be in full discharge of all demands in respect of such cause of action, and entry of the judgment shall be made accordingly." In *Lord Bagot v. Williams* (3 Barn. & Cress. 235), which was an action of *assumpsit* for money had and received; plea, a judgment recovered for want of a plea for 4,000*l*. in an Inferior Court in Wales, for the same causes of action; replication, that the causes of action were not the same, and issue joined thereon. At the trial it appeared that the defendant had received, on account of the plaintiff, and as his steward, different sums of money at different times, and that on the investigation of the accounts the plaintiff found that there was due to him a much larger sum than that for which he had declared in the Inferior Court, but that he had proceeded for the smaller sum, under the belief that the defendant had no available property beyond that amount. Defendant in that action suffered judgment by default, and plaintiff verified for 3,400*l*. It was there held that all the sums which the plaintiff knew the defendant had received at the time when he commenced the action in the Inferior Court were to be considered as causes of action, in respect of which he had declared and recovered the judgment. In *Dunn v. Murray* (9 B. & C. 780), the declaration stated that, in consideration that the plaintiff, at the request of the defendant, would enter into the employ of the defendant in a certain capacity for a year, at the rate of five guineas per week throughout the year, defendant undertook to employ him for a year, and it was alleged as a breach that the defendant dismissed the plaintiff from his employ before the end of the year without any reasonable or probable cause. The declaration contained counts for wages, and for work and labour, &c. The cause, which was commenced before the expiration of the year, was referred to an arbitrator, who awarded to the plaintiff a sum of money equivalent in amount to the wages he would have been entitled to receive from the defendant on the day when the action was commenced. No claim was made before the arbitrator for any compensation in damages for the dismissal, except so far as the special count in the declaration, and the evidence of the employment and the dismissal might amount to such a claim. The plaintiff having afterwards brought an action to recover a compensation in damages, in consequence of the dismissal from the defendant's employ before the end of the year, it was held, that the award of the arbitrator was a bar to such action; that the claim for which the suit was instituted might have been brought before the arbitrator on that occasion; and that the award therefore precluded the plaintiff from bringing a fresh action, as the award was made in respect of the whole of the matters in difference in the action then referred. The case of *Todd v. Emly* was also cited. [PARKE, B.—The Irish Act is much more distinct, there a demand may be split; in the decision given, the

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Court there certainly looked at the English decision rather than the Irish Act.] There is nothing in Bacon's Abridg. or Fitz. N. B. material to this case. It is a County Court where not more than 20*l.* can be claimed. A sum of 21*l.* is out of its jurisdiction; any larger amount would be *coram non judice* at once. The 60th section enacts, that a summons may issue in any district in which the defendant, or one of the defendants, shall dwell or carry on his business, at the time of the action brought; or by leave of the Court for the district in which the defendant, or one of the defendants, shall have dwelt or carried on his business, at some time within six calendar months next before the time of the action brought, or in which the cause of action arose, such summons may issue in either of such last-mentioned Courts. The 63rd section of the Act must be read with reference to the 58th section. *Clark v. Askew* (8 East, 28), and *Porter v. Philpot* (14 East, 344), were referred to, showing the construction put by the Court upon the Southwark Court of Requests Act; and *Shaddick v. Bennett* (4 B. & Cress. 769), on the London Court of Requests Act. Yet, under the present County Court Act, with reference to the case under consideration, if there be a series of claims evidently of the same description, in total amount over 20*l.*, then a plaintiff, unless he chooses to abandon all excess, should sue for the whole in the Superior Court. If this were not so, the object of the Act would undoubtedly be frustrated, and instead of its being beneficial to the public, it would indeed be a public nuisance. In the present case, it should be stated that the defendant denies his giving any orders at all. The summonses were all issued by the same plaintiff against the same defendant. The 29th of June is the earliest date, and the 10th of July the latest, when, and between which, the goods for which these 228 summonses issued were supplied.

POLLOCK, B.—We will consider the question, which is one of very great and general importance. I own, for my part, I cannot make out how one man can have 228 causes of action against another in the self-same day, and in the self-same words too; but we will consider the matter.

PARKE, B.—The case certainly involves a serious question. The proceeding of the plaintiff is clearly an abuse of the Act; and the only point is, whether we are to correct that abuse by prohibition, or leave it to the discretion of the presiding Judge.

Cur. adv. vult.

JUDGMENT.—April 29.

POLLOCK, C. B., now delivered judgment.—A rule *nisi* was obtained in this case for a prohibition to the Judge of the County Court for Shipston district, in Worcestershire, against proceeding further in 228 complaints at the suit of the plaintiff, for which summonses had been served upon the defendant, the total amount of the sums claimed in all of which, taken together, was 303*l.* 19*s.* The amount in several summonses varied from 5*s.* to 5*l.*; but all,

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it was alleged, related to the one cause of action. It was stated that the debt arose under these circumstances:—The defendant was a contractor for making a part of the Oxford, Worcester, and Wolverhampton Railway, and he told the plaintiff, a grocer, to supply his labourers with provisions and other articles according to written orders, which would be given from time to time to the men by his sub-contractors. It appeared from the affidavits now put in on behalf of the plaintiff that these orders, of which upwards of 3,000 had been issued, were in this form:—

“Middleton Hill, July 14, 1847.

“Mr. Grimbley, let the bearer have goods to the amount of (five) shillings.

“Chadwick & Edwards.”

That, upon their being presented to the plaintiff, he supplied the bearer with the amount in such goods as he required; and that the sub-contractors, on settling every Saturday with the men, deducted the amount of these orders in their accounts as so much money paid. Goods to a large amount having been supplied under this arrangement, and upwards of 300*l.* finally remaining unpaid, the plaintiff commenced, on the 17th of September, 1847, 228 *plaint* (each *plaint* being for the amount of the goods supplied to each workman), in the County Court against the defendant, and recovered judgment, and received the amount in one of them for 10 before he could be stayed by the present rule. It was stated that when the rule was moved for the costs in that suit amounted to upwards of 10*l.*; and that if all were to be contested that would be the average amount of costs in each. Cause was shown against the rule in the last term by Mr. *Whitehurst* and Mr. *Figgott*, and judgment was then reserved. But for the purpose of the present decision this was wholly immaterial, the question being whether on the assumption that he was indebted, the County Court has jurisdiction. This depends on the true construction of the Small Debts Act, 9 & 10 Vict. c. 95, particularly the 63rd section, and not upon any old rule of the Common Law as to the jurisdiction of the County Court. It will be proper, however, to consider what the rule was, in order to give a true construction to the County Courts Act. At Common Law the County Court held pleas of debt or damages to the value of 40*s.* or above (4 Inst. 266.) “*Placita de catallis debitis quæ summam 40s. attingunt vel eum excedunt sine brevi regis placitari non debent*” (2 Inst. 312) and if an entire contract or debt of 40*s.* or upwards was severed into sums below 40*s.* a prohibition was granted: (Roll’s Abr. “Prohibition,” 317.) And without saying that the debt arose on an entire contract, it was laid down by Fitzherbert (*Natura Brevium* 66), “that if a man do owe another man five marks, and he sue several *plaints* for the same in the County Court, or any other Court (meaning, no doubt, the Hundred Court or Court Baron, against the debtor, he shall have a prohibition thereof and rehear

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the matter, and that it would defraud the King's Court of its jurisdiction." This doctrine was applied to contracts made at different times between the same persons for several sums each less than 40s. but altogether amounting to more. In an *Anonymous* case (1 Vent. 65), in *Girling v. Adams*, reported by the name of *Girling v. Aldas* (1 Vent. 73), which was for the price of various parcels of malt, sold at different times, "because though they be several contracts, yet forasmuch as the plaintiff might have joined them all in one action, he ought so to have done, and sued in the Court above, and not put the defendant to an unnecessary vexation; no more than he can split an entire debt into divers sums to give the Inferior Court jurisdiction in *fraudem legis*." The reason given is a very satisfactory one, for it would be extremely vexatious if a plaintiff, from whom goods had been purchased in small quantities, at small prices, at different times, by distinct contracts, either payable immediately, or on credit, which had expired, instead of including all in one action, which he could do after the debt became all due, should divide the debt into several debts, and sue for each in a separate action in the County Court, which could give no adequate relief by consolidating them, in the exercise of their equitable jurisdiction, if they had any, as a Superior Court would, for they could not unite them so as in the aggregate to exceed or be equal to 40s. The extent to which that vexation might be carried may be illustrated by the present case, in which tickets were given, upon which the plaintiff supplied goods, and it appeared that there were 3,000 different tickets, and consequently 3,000 different items or separate contracts. It is quite true, indeed, that when each contract became due in cash, the creditor might, in the absence of any implied contract to the contrary, immediately sue for it, but when several debts had become due, he could unite them in one count in debt on simple contract, or in *indebitatus assumpsit*, as one entire debt, and there appears to be no good reason why he should not do so. In the case of *Rex v. The Sheriff of Herefordshire* (1 B. & Adol. 672), the judgment of Lord Tenterden was said to be at variance with the law laid down in the older authorities. The case itself, however, might be distinguished, because there the debts were treated as being entirely distinct and separate from each other, the one having no connexion with the other. But in the case of a running account with a tradesman the items are generally connected, the different contracts being usually made with the understanding that, if not paid until after others have been made, they are to form part of the same debt, or that several items are to be united in one bill. The present case, however, does not depend upon any authority derived from reported cases, but upon the construction of the recent Act, 9 & 10 Vict. c. 95. By the 58th section, the new Court has jurisdiction in all pleas of personal actions, where the debt or damage claimed is not more than 20*l.* whether on a balance of account or otherwise. That clause had probably been introduced in consequence of the provision in some of the Courts of Requests Act, that the Act should

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not extend to any debt for the balance of an account originally exceeding a given sum (as in *Porter v. Philpot*, 14 East, 345.) that as it may, it cannot be doubted that the law was made to give jurisdiction where the debt claimed consisted of various items together originally not exceeding 20*l*. at the time of the suit, which had been reduced to that amount by payment or set-off of other sums. They had next to consider the effect of the 63rd section, and the whole question is as to the meaning of the term "cause of action" in that section. It is provided that it shall not be lawful to divide any cause of action for the purpose of bringing two or more suits in any of the said Courts; but any plaintiff having "cause of action" for more than 20*l*. for which a plea might be entered under this Act if not for more than 20*l*. may abandon the excess, and thereupon the plaintiff shall, on proving his case, recover to an amount not exceeding 20*l*. and the judgment of the Court upon such plea shall be in full discharge of all demands in respect of such cause of action, and entry of the judgment shall be made accordingly. What, then, is the construction of the words "cause of action?" The term "debt" or "damage" here is not used as it is in the passage already cited from 4 Inst. 28, but the more extensive term adopted is "cause of action." The term, "cause of action," did not necessarily mean "a cause of action" on one single entire contract, for there may be one cause of action on several debts contracted at different times, as in by far the greater number of cases a count in *indebitatus assumpsit*, or debt, is founded on many distinct contracts, as was pointed out in the case of *Hesketh v. Fawcett* (11 M. & W. 36) and one count might be considered as one cause of action. To provide that one cause of action on one entire contract should not be divided would be unnecessary and surplusage, and although the argument that a clause in an Act of Parliament, if understood in one sense would be inoperative, and in another sense would be operative, is not by any means conclusive, because it could not but be admitted that clauses are often introduced into an Act of Parliament *ex abundanti cautela*, yet it is of some weight, and the probability was that the Legislature, in enacting that a "cause of action" should not be divisible, meant a "cause of action" which, but for that enactment, would be divisible. And when it is considered to what abuses the narrower construction of the term might lead (which is strongly exemplified in the present case in which 228 actions have been commenced, and 3,000 might have been brought), we think we may safely conclude that the term "cause of action" ought to be interpreted "cause of action," and not be limited to an action on "one separate contract." But, on the other hand, if the term is to comprise several sums that might be included in one count, as debt for wages and labour, for goods sold, and for occupation, which, though totally unconnected with each other, might be included in an *indebitatus* count, they would be precluded from being divided under this particular clause, and if indivisible, and the credi-

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ought an action for only one part, he would virtually abandon claim to the remainder by the operation of the latter part of the 63rd section. In such a case Mr. Justice Coleridge held that a similar clause in the Brighton Court of Requests Act, 3 & 4 Vict. c. 10, s. 24, did not apply. In that case the demand had been for three distinct things, a horse sold, for goods sold, and for rent; but he made a distinction between that case and one where a debtor has a bill running on from day to day: (*Neale v. Ellis*, 1 Dowl. & L. 163; 12 L. J., Q. B. 329). In such a case, though each item of goods supplied, or work done, constituted a separate contract, so that, after the stipulated price came due the tradesman could sue for one item, yet the understanding is undoubtedly that the several items shall be united, and so form one entire demand; and, doubtless, if, after several items have been added to the first, the tradesman were to bring a separate action for each item, as for a distinct debt, a Superior Court would stigmatise such a proceeding as vexatious. It appears, then, that a great inconvenience would follow if the term "cause of action" were interpreted to mean "cause of action" on one separate contract; and also if the construction were to be that it was intended to cover all contracts executed, however dissimilar in character, that could be included in one *indebitatus assumpsit*, which, according to the modern practice, may comprise any number of separate unconnected contracts, whenever made, each having ended in a debt before the commencement of the suit. Some extension must be given to the former construction, some restriction must be put on the latter, and we think we ought to hold that the 63rd clause does apply to the former cases; whether applied to all debts which could be comprised in one description, or one count, as for goods sold, or not, the Court need not in the present instance determine; but, at all events, to the case of tradesmen's bills, in which one item is connected with another in this sense, that the dealing is not intended to terminate with one contract, but to be continuous, so that one item, if not paid, shall be united with another and form one entire demand. If that demand exceeds 20*l.* it would, of course, cease to be within the jurisdiction of the County Court, and therefore we are of opinion, from the facts disclosed in the affidavits before us, that all the debts claimed fall within that description—the total greatly exceeding 20*l.*—and that they ought not to have been separated into different counts. Whether, if the total had only amounted to 20*l.* and the debts then were separated and sued for by separate plaints—the total being within the jurisdiction of the County Courts, which would then have given adequate relief—the suits could have been exhibited, was a question which need not in the present instance be discussed. But, when the total exceeds that amount, and relief cannot be done in the County Court, we are of opinion that the County Court has no jurisdiction; and, therefore, that the prohibition applied for by this rule ought to go.

Rule absolute for a prohibition.

COURT OF EXCHEQUER.

Easter Term, 1848.

WINSOR v. DUNFORD.

Action on a judgment.

Action on a judgment, where judgment roll of a Superior Court shows a debt of 40l., and there was no remittitur, but final judgment for 17l. for which an action was brought in the County Court.

Held, that this was a good judgment for 17l.

But, whether an action will lie in the County Court upon a judgment obtained in a Superior Court, quære?

Semble, that if a judge of the County Court should receive proof of such judgment as evidence of the debt, this Court will not interfere, it being within the jurisdiction of the judge.

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NAYLOR applied on behalf of the defendant for a rule to show cause why a writ of prohibition should not issue, directed to the Judge of the County Court at Bloomsbury, Middlesex, to restrain his further proceeding in this case. It appeared that judgment had been obtained in one of the Superior Courts at Westminster against the defendant, at the suit of the plaintiff; the judgment roll would show it to be a debt of 40l., but final judgment was in fact for 17l., and there had been no remittitur. [ROLFE, F.—Still it is a good judgment for 17l.] The County Court has no power to interfere where there is a judgment in the Superior Court. In a similar case of *Peirce v. James* (1 Cox & Macrae, 45), a like application had been made, and a rule nisi granted; it was afterwards made absolute, there being no cause shown against it. The Court below had allowed an examined copy of the judgment to be admitted as evidence, which should not have been admitted. He referred to *Breedon v. Gill* (5 Mod. 272); *Shotter v. Friend* (1 Show. 172).

PARKE, B.—If the judge receives improper evidence, we cannot restrain him upon a representation that he has not acted strictly legally in receiving that which he has jurisdiction to entertain. The power is given to those Courts to decide, the discretion is with them, and no doubt they exercise it to the best of their ability. There is no appeal.

ROLFE, B.—Your application would go to show that where a judge of one of the County Courts had received what may be supposed to be improper evidence, one of the Superior Courts may be called upon to interfere by granting a rule for a prohibition.

PARKE, B.—There will be no rule on the last point; on the first you may take it, as there was one granted before, to which no cause was shown; but you would have very great difficulty in maintaining it if objected to.

Rule nisi.

COURT OF QUEEN'S BENCH.

*Easter Term, 1848.**Re THE COUNTY COURT OF LANCASHIRE.**Jurisdiction—Replevin.*

no County Courts have jurisdiction in replevin under the 121st section of the County Courts Act, although the sum in dispute exceeds 20l. Revisions of the 58th section do not restrain the jurisdiction of the County Courts in replevin.

CHBOLD moved for a rule *nisi* for a writ of prohibition to the County Court of Lancashire. An action of replevin had commenced in that Court, and the damage laid at 200l. and actually obtained for 75l. This is beyond the jurisdiction of the County Court, which, by sect. 58, is limited to 20l. In the County Court the damages in replevin are only three guineas. J.—Is not a replevin suit in the County Court at Common Law transferred at the second stage into the new Court? It is submitted that the 58th section rescinds the clauses as to jurisdiction. [WIGHTMAN, J.—Where is a replevin suit to be commenced now?] At Common Law replevins were by writ out of county, and goods were not then handed over, but detained until termination of the action. [WIGHTMAN, J.—Is not the writ by plaint? ERLE, J.—At Common Law the County Court has jurisdiction in replevin above 40s.: (4 Inst. 266).] The new Act cuts down this power. [PATTESON, J.—The 121st section contemplates the cause going on where more than 20l. is to be recovered, and gives power to either party to remove the case.] It never could have been intended to give unlimited jurisdiction.

ERLE, J.—The words in the 58th section do not limit the jurisdiction of the Court as to replevin.

PATTESON, J.—The effect of the statute is, that whereas by a *re fu. lo.* might in any case have been obtained, it is now limited to the conditions imposed by the 121st section. (a)

WIGHTMAN and ERLE, JJ., concurred.

Rule refused.

The 121st section thus provides:—"And be it enacted, that in case either party to any action of replevin shall declare to the Court in which such action shall be brought that the thing is any corporeal or incorporeal hereditament, or to any toll, market, fair, or franchise, or that the rent or damage in respect of which the distress shall have been taken exceeds the sum of twenty pounds, and shall become bound, with two sufficient sureties, approved by the clerk of the Court, in such sums as to the judge shall seem reasonable, having regard to the nature of the claim, and the alleged value or amount of the property, or of the rent or damage, to prosecute the suit with effect and without delay, and before the Court by which such suit shall be tried that such title as aforesaid is in dispute between the parties, or that there was ground for believing that the said rent or damage exceeds twenty pounds, then, and not otherwise, the action may be removed before any competent court to try the same in such manner as hath been accustomed."

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LANCASHIRE.
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BAIL COURT.

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(Before COLERIDGE, J.)

JONES v. JONES AND ANOTHER.

Jurisdiction—Power of Judge to rescind his decision.

A judge of the County Court having pronounced his decision upon a case before him, which decision was recorded by the clerk in the register book, the judge, after the parties had left the Court, rescinded the decision, adjourned the matter to the next following Court, and gave notice to the parties that he had done so, and requested them to attend accordingly. The defendants, for whom the judgment was given on the first occasion, attended, and protested against a further hearing on the ground that it had been decided before in their favour. The judge proceeded, notwithstanding, and reversed his former decision because a plea of the Statute of Limitations had been pleaded and admitted, without five clear days' previous notice having been given of an intention to plead that plea, pursuant to the 19th rule of practice. On behalf of the defendants it was sworn that they believed the first judgment so given and recorded was not rescinded on the same day or at the same Court, but subsequently thereto; and that not being expressly denied by affidavit, a verified copy of the record or register book only being produced, whereby it merely appeared to have been done on the same day:

Held, insufficient, and that prohibition must issue.

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FREDERICK BAILEY showed cause against a rule obtained herein, calling upon the judge of the County Court of Merionethshire, and the plaintiff in the suit, to show cause why a writ of prohibition should not issue directed to such judge and his officers, to prevent execution or any other step being taken, or their giving validity to a judgment pronounced in the above suit at Corwen, on the 13th of October last, by the learned judge. The rule in this case was obtained upon an affidavit of the clerk of the defendants' attorney, to which a preliminary objection was taken. It referred to three documents, being annexed thereto: exhibits, that is, a copy of the promissory note upon which the action in the County Court was brought, a copy of the summons and also of the order made for payment of the principal, interest and costs; neither of those documents was, however, annexed. There was a copy of a summons annexed, but that was stated by the commissioner to be the exhibit to an affidavit sworn before him on the 25th of January; the only affidavit here was an affidavit of the 28th of January. The affidavit was also in other respects informal.

COLERIDGE, J., called upon the other side.

Lloyd, contra.—I don't know how that is; a technical error, certainly; it is not material at all to the merits of the case. The exhibits were not essential, nor could the other side be misled by the omission or irregularity.

Bailey.—The rule was granted, and is so drawn up on reading the affidavit and paper writing thereto annexed. I can scarcely say the parties could have been actually misled; it may have formed the ground for granting the rule *nisi*. [COLERIDGE, J.—No; you could not have been misled; the date is no doubt a clerical error; you must go on.] The matter is not very material, as it is apprehended the rule will be discharged upon the merits. The facts are these; a summons was obtained by the plaintiff against the defendants, returnable on the 23rd of July, 1847, and was for the recovery of 16*l*, principal and interest due on a promissory note dated the 18th of February, 1834. The Statute of Limitations was the defence; the 19th rule of practice of the County Courts, as framed by the judges, states that “where a defendant intends to rely on the special defence of infancy, coverage, the Statute of Limitations, &c., he shall give notice thereof in writing to the clerk of the Court five clear days before the day on which the summons is returnable: provided always, that where such notice shall not have been given, the judge, in his discretion and on such terms as he shall think fit, may adjourn the hearing of the cause to enable the defendant to give such notice such number of days before the day to which the hearing may be adjourned as the judge may think proper.” No notice whatever was given of the defendants’ intention to plead the Statute of Limitations before the 23rd of July, when the summons was returnable at that Court. The parties came, and although the particulars of demand given had stated the amount of the note, to and from whom it was due, and the date, yet the defendants asked to have better particulars by requiring a copy of the note, thinking, no doubt, it would cause the matter to be adjourned till the next Court, and thus enable them to plead the statute. The judge granted their application for better particulars, and adjourned the case until the 11th of August, but he was never asked, nor did he grant, the defendants liberty to give such notice, nor was there in fact any notice given five days before the day (11th of August) to which the hearing was adjourned, so as to bring it within the terms of the proviso of the 19th rule above stated. It was sworn on the other side that a plea of the statute had been pleaded five clear days before the 11th of August, but it would be impossible to consider that plea as well pleaded. The parties attended on the 11th of August, when the case stood over until the next following day, the 12th of August. It was then adjourned until the next Court, to be holden on the 9th of September. [COLERIDGE, J.—Why was it so adjourned?] The affidavit on the other side states, for the purpose of enabling the plaintiff to offer some proof to answer the statute, and I have no contradiction to it. A verified copy of the record or register book is here, and this entry appears as the

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account of what took place respecting it on the 9th of September—
“Adjourned from last Court (No. 65).” “Stat. Limita. verdict for
defendants; costs to be divided.” “No. 65. Same Court.—The
above decision rescinded, and case adjourned to the next Court.”
It is sworn by the clerk to the defendants’ attorney that the defen-
dants had left the Court when the revocation occurred, but they
had notice directly afterwards of the fact, and were required to
attend at the next adjourned Court held on the 13th of October.
The parties then again attended, when the judge gave judgment
in favour of the plaintiff’s claim, with costs, on the ground that the
defendants’ plea was never properly or duly pleaded in compliance
with the 19th rule. [COLERIDGE, J.—What do you say to his
rescinding his judgment in the absence of the parties?] That he
was justified in doing so; first, because it was a mere decision or
expression of opinion, and not a judgment, within the meaning of
the Act; and, secondly, if it should be considered a judgment, that
he had a perfect right to alter it at the same Court on the same
day, although the parties had left, and the entry, such as it was,
had been made in the book referred to. It was evident in what
haste and how improperly the entry was made by the clerk, by his
calling it “verdict for the defendants,” when it was clear, from the
affidavit on the other side, there was no jury, and verdict implies
the finding of a jury, and not the expression of opinion of a judge.
The entry is not in form a judgment in accordance with the Act
or decided cases. [COLERIDGE, J.—The decision was made and
entered by the clerk in the proper book, and the parties had left
the Court and gone away. You can scarcely contend it was not a
judgment.] Then the Court was imposed upon, the plea of the
Statute of Limitations not having ever been properly pleaded; or
should it in any way have appeared upon the record of the proceed-
ings, probably the plaintiff was not aware of the 19th rule; yet
that want of objection would not make the plea valid. During the
same Court and the same day, the learned judge had power to
alter his judgment, in analogy to the Superior Courts of Common
Law at Westminster; and these Courts, it can scarcely be doubted,
may amend their judgments of the same term, because the term is
but as one day in law: (2 Lill. 103; *Chambers v. Moore*, 3 Levinz,
430.) In *Reg v. Carlisle* (2 B. & Adol. 973), Parke, J., says, that
during the same term the judgment is still in the breast of the
Court, but it is not so afterwards: (Co. Litt. 260, a.) So also is
the Quarter Sessions considered as one day, and during that period
the Court may alter or amend its judgment. In *Dickenson’s*
Quarter Sessions, 5th edit. 61, it is said, “justices may, before the
actual close of the sessions, on whatever day, alter their orders of
sentences, but they cannot do so after the session is closed—*e. g.*,
at the next session.” In *Keen v. The Queen* (3 New Sess. Cas. 20;
16 L. J. 180, M. C. S. C.), the Court of Queen’s Bench did not
approve of the latter part of that passage, and thought the Quarter
Sessions had power to respite and adjourn from one session to an-
other: (see also 2 Salk. 606; 6 Mod. 287; Bacon’s Abridgment,

t of Sessions.") In principle this case is precisely similar; it is shown, from the verified copy of the entry, the alteration of the judgment was made at the same Court, the learned judge had a perfect right then to do so; and upon that ground this could be discharged. This Court will not interfere, as its jurisdiction is discretionary in issuing writs of prohibition, unless there is clearly an excess of jurisdiction and injustice has been done between the parties; but, so far from it, the Statute of Limitations always operates hardly upon a plaintiff, who, in consequence of forbearance in enforcing payment, has that leniency set up against him as a discharge of all principal and interest here, however, the plea so pleaded was, from the 19th rule having been complied with, a complete nullity, and ought not to have been received. But so far from there being any injustice arising in consequence of the learned judge's ultimate decision, the justice of the case is only now satisfied by the judgment last given.

vs Lloyd, contra, in support of the rule.—[COLERIDGE, J. The only point that presses you is the want of jurisdiction.] The judge had pronounced his judgment in the case, at the sittings on the 9th of September, he could give no other; *functus officio*. Notice was given, no doubt, to the defendants several days afterwards, to attend at the Court next on the 13th of October following; but my affidavit states the defendants had gone away from the Court on the 9th of September, after the judgment given in their favour was duly pronounced; and that the deponent knew nothing, nor does he know what the defendants, until many days afterwards, of the giving of such judgment so given in their favour on the 9th of September; and further, that they believe no revocation, alteration, or rescinding of such judgment took place at all on that day, or at the Court holden on that day (the 9th of September), but that no alteration or rescinding of the judgment did take place, it was not at the same Court or on the same day, but at some time afterwards.

COLERIDGE, J.—What is said in answer to that by the other

party.—There is here a verified copy of the register book or of the proceedings in that Court, and this shows expressly what was at the same Court: the defendants' agent only swears to his belief about the matter, and to conclude from that, that the judgment was made subsequently, would be to suppose that the case had been improperly dealt with upon the deponent's mere

objection.—An affidavit may have been produced, denying that the judgment could be denied, but there is no affidavit at all upon the matter and it may be taken consequently as true. An alteration of the judgment, after the Court has risen, is, at all events, not to be received; the judge had no power whatever to do it under the circumstances of this case; making it the day after the Court had adjourned is the same as doing it a year afterwards. When the judge-

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ment is once given, and the Court closed, the judge cannot it, any more than a judgment could be altered in the Sup Court after the end of the term. The parties attended a Court held on the 13th of October, and protested against the judge proceeding to give another judgment in the case, on ground that he had before decided it at the previous Court the 9th of September. In 2 Co. Litt. 277 (1), it is stated, after verdict has been recorded, it cannot be altered, and on face of the record here, a verdict is recorded in favour of defendants. A verdict of the jury is in that respect the same as a judgment of the judge and in the County Court the judge sometimes both judge and jury, and if he be allowed to alter his judgment after the Court has risen, he may do it at any even months subsequent. I am not prepared to say whether there was a jury to give a verdict on the 9th of September or not. It does not appear, or is it admitted by my affidavit, as stated by the other side, that there was not a jury; it says, a judgment was given by the judge on that day; still there may have been a jury. To the injustice of the case, that appears to be on the defendant's side; the note of hand on which the action was brought appears to be fourteen years old, and the law presumes in such a case that the money had been paid; the plea of the Statute of Limitations was pleaded and admitted, and no one objected to it on these reasons, therefore, it is submitted, this rule should be absolute.

COLERIDGE, J.—I am of opinion this rule should be made absolute, not on the ground of an improper exercise of discretion by the judge, because on that I should have no right to interfere; but on the ground that he has exceeded his jurisdiction by taking place after the 9th of September, unless, indeed, it can be considered that what took place before was null and void. Now, although it might have been irregular to have pleaded the Statute of Limitations without a previous notice, yet the plaintiff was aware, long before the Court holden on the 9th of September at which the judgment was given, that the defendants intended to plead that plea; for it appears the defendants came to Court held on the 11th of August, with that plea, so that at the Courts, at which that plea of the Statute of Limitations was pleaded, that is to say, on the 11th of August, 12th of August, and 9th of September, respectively, no objection was made, and indeed time was given to the plaintiff to enable him to answer it on the 11th and 12th of August, and thence until the 9th of September, and being at that time unable to do so, judgment was given for the defendants. It is not now material to inquire whether or not the case was heard by a jury; but if it was heard, it is clear that the judge had no power to alter the verdict, and if heard by the judge alone, it appears that he made his decision in favour of the defendants, and it was entered in the book kept for that purpose in that way; it was therefore confirmed in their favour on that day. I do not mean to say but that a

might alter his judgment on the same day, during the sitting of the Court, but he can have no authority to alter it in his own chambers, and behind the back of the parties, after the Court has broken up. The defendants, who had gone away as soon as they heard judgment pronounced in their favour, cannot, of course, speak to every thing which transpires in their absence; but the clerk to the defendants' attorney does say that he believes, and the defendants also believe, that the judgment given for them, and recorded on the 9th of September, was never altered or rescinded at any time on that day, and that, if it had ever been altered at all, it must have been after the Court had risen, and on a subsequent day. Surely this calls upon the other side to say whether or not, in fact, the judgment was so altered on the same day. They had notice of this statement in the affidavit produced on the part of the defendants, and might have produced an affidavit in contradiction, had this not been so; but, instead of this, they merely give a verified copy of the entry of the judgment, and its being rescinded on that day, as entered in the book, which appears to be rather an evasion of the facts. I think, therefore, that there has been an excess of jurisdiction, and that the rule for a prohibition should be made absolute. *Rule absolute, without costs.*

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ROBINSON v. LENAGHAN.

Jurisdiction—Process—Proof of service of summons.

A summons was issued in the County Court against the defendant, and served at a place where defendant was not known; proof of the service was accepted by the judge, and in defendant's absence the plaintiff was heard and obtained judgment, and thereupon execution issued. The first intimation defendant had of any such action being brought was the appearance of the bailiff to levy. The defendant applied to the judge of the Court from which execution had issued for a new trial, which the judge consented to grant upon terms that defendant should undertake to appear and defend the action on its merits, and to bring no action against the officer. This the defendant refused, but applied to the Superior Court for a prohibition.

Held, that the County Court has jurisdiction wherever due proof is given of the service of the summons: that the question of what is due proof is exclusively in the discretion of the judge, from which there is no appeal to this Court, and that, therefore, not being a question of jurisdiction, it cannot be entertained, nor can a prohibition be allowed. Whether prohibition would lie after execution, quære?

BBROWN showed cause against a rule which had been obtained by Willes, calling on the judge of one of the County Courts for Middlesex, and Robinson, the plaintiff in the County Court,

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to show cause why a writ of prohibition should not issue to prohibit the said Court from further proceeding in the cause, and why £6. 10s. 11d. paid under protest to the high bailiff should not be returned.

It appeared that the defendant, on returning to his lodgings one evening, found a person in possession of his goods under an execution from the County Court; the defendant immediately went to the County Court, and, after waiting until midnight, was told that the judge could not assist him, but if he could show in what way the judge could interfere he might go the next day. He accordingly attended the following day and moved to set aside the proceedings. It appeared that Lenaghan, the defendant, lived at Highbury Villas, but the summons from the County Court was left at a place called Paull's Villa, at which place Lenaghan had never resided; and when the officer left the summons a person in the house told him that Mr. Lenaghan did not reside there, and was not known there. Lenaghan himself distinctly stated that he had no knowledge whatever of the proceedings until the execution was put into his house. Upon this state of facts the judge of the County Court made the following order:—"It is ordered, that on the defendant undertaking to appear and defend this case on the merits, and also undertaking to bring no action against the plaintiff, or any officer of the Court, the judgment be set aside, and in default of giving such undertaking on Saturday next, it is ordered that the said judgment and execution be confirmed."

Willes, on the last day of Hilary Term, having obtained a rule for a prohibition,

Brown now showed cause.—This rule was obtained on the authority of a case, *Ferguson v. Mahon* (11 Ad. & Ell. 179) which was an action of debt on a judgment, and the plea was that the defendant had no notice whatever of the proceeding against him; but that case is no authority on an application for a prohibition; it merely decides that the Court will not allow an action to be brought upon the judgment under such circumstances. On reference to the statute which constitutes the County Court it will appear that this is not the proper mode of taking advantage of the objection there might be to these proceedings; the Court had clearly jurisdiction over the case. The 80th section says that if the defendant shall not appear, or sufficiently excuse his absence, the judge, upon due proof of service of the summons may proceed to the hearing or trial of the cause on the part of the plaintiff only, and the judgment thereupon shall be as valid as if both parties had attended, provided always that the judge in any such case may set aside any judgment so given in the absence of the defendant, and the execution thereupon, and may grant a new trial of the case upon such terms as he may think fit. If the application is too late, there is nothing to be prohibited. Executions having issued there is nothing to be done. One of the latest cases on this subject is the case of *The Dean of York* (2 Q. B. 1); and

from that case it appears that, when there is any thing remaining to be done, a prohibition may issue. That was an application for a prohibition to restrain the Archbishop from proceeding in certain charges of felony against the Dean of York, and the Court said, "There is one (objection) not unfit to be disposed of. The sentence being final and executed, it was argued that nothing now remained which this Court could prohibit from being done, and not even a continuing Court to which our writ could be addressed. These arguments, for obvious reasons, require to be narrowly watched, for they would give effect to unlawful proceedings merely because they were brought to a conclusion. But to the present case they are inapplicable, for on looking at the sentence we find that it admonishes the Dean not to exercise the functions of Dean on pain of the greater excommunication; the Court was adjourned only when this motion was made. The infliction of that pain would be the mode of enforcing the sentence, and this we may prohibit, and we find in some of the entries that this Court has enjoined revocation of the sentence. The Dean could not apply before sentence, for the sentence of deprivation is the only thing done which is beyond the jurisdiction of the Archbishop." There the sentence was continuing; there was something to be done, and therefore a prohibition might issue, there being something to prohibit. Most of the cases on this subject relate to prohibitions in the Ecclesiastical Courts, and it will be found that it has been granted after sentence; and in nearly all of the cases, as in that of *The Dean of York*, the execution has been continuing, but here the judgment has been executed, and there is nothing more to be done. The matter was much discussed in the case of a court-martial, *Re Poe* (5 B. & Ad. 681), in which the Court held that a prohibition will not issue to a court-martial after its sentence has been ratified by the Crown and carried into execution. Lord Denman said,—“We could not understand why, or to what end, a prohibition should be granted, nor to whom it could be directed, nor what it could prohibit; for not only had the sentence been carried into complete execution, but the court-martial itself, having performed all its functions, had ceased to exist * * * We therefore desired to be furnished with some authority, if any could be found, for granting a prohibition after complete execution of the sentence imposed by the Inferior Court, and several cases were at a subsequent day laid before us, none of which, however, on examination, appear to us to establish the proposition, while others are examples of acting on the contrary doctrine. In *Hall v. Norwood* (1 Sid. 166), the Court held that a motion for a prohibition came too late after judgment and execution in the Court below, because there is no person who can be prohibited. And a similar view is taken in *Darby v. Cozens* (1 T. R. 552).” On referring to the statute it is evident that this is not the way to take advantage of the proceedings. The County Court had undoubted jurisdiction over the case, and an objection is raised to something that takes place in the course

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of the case. Now, on that ground no prohibition will lie, unless there is something improper in the Court below, and here it cannot be contended that there was anything improper until the application was made to set aside the judgment and execution. The judge was bound by the Act to do all that he did. By the 80th section of the 9 & 10 Vict. c. 95, if the defendant does not appear, upon proof of service of the summons, the judge is to proceed to the hearing, and give judgment. For the purpose of the argument, we may assume that the bailiff made a false oath as to the service; nevertheless, by this section the judge is bound to give judgment, and in doing so in this case has only complied with the requisitions of the statute. (He was then stopped by the Court.)

Willes, contra.—In this case the defendant had no notice of the proceedings, and had no opportunity to appear in proper time, and the whole matter should be treated as a nullity. The Inferior Court is in some respects in the same situation as the Superior Courts as to what may be done under such circumstances. The proceedings should be considered as a nullity, the defendant having had no notice whatever of the matter until the execution was put into his house. Suppose there had been a refusal to hear the defendant, would not the Court above interfere to give relief? He cited the case *In the matter of the Dean of York* (2 Q. B. 1) [PLATT, B.—Does it appear by your affidavits that the defendant has not had the money back?] It does not. The 80th section of the Act applies to this case, which enacts, “that if on the day so named in the summons, or at any continuation or adjournment of the Court or cause in which the summons was issued, the defendant shall not appear, or sufficiently excuse his absence, or shall neglect to answer when called in Court, the judge, upon due proof of service of the summons, may proceed to the hearing or trial of the cause on the part of the plaintiff only, and the judgment thereupon shall be as valid as if both parties had attended: provided always, that the judge in any such case, at the same or any subsequent Court, may set aside any judgment so given in the absence of the defendant, and the execution thereupon, and may grant a new trial of the cause, upon such terms, if any, as to payment of costs, giving security for debt or costs, or such other terms as he may think fit, on sufficient cause shown to him for that purpose.” The defendant was not there, and it should be considered as if he had not been there, in which case the prohibition should go to prevent the money being paid over by the officer. It had been said that a prohibition could not go after execution, as there was nothing to prohibit; but that was not so. He then referred, as an authority to that effect, to Fitzherbert’s *Natura Brevium*, 46, which says, “after judgment given and execution awarded in the country or other Court Baron, which hath not power to hold plea of debt of the sum of 40s., &c., or of damages in trespass amounting to such sum or more, the party defendant shall have a writ of prohibition unto the bailiff, or unto the sheriff or officers of the Court, that they

execution, and if they have distrained the party, to make provision that then they release the distress, and that they revoke any writ they have done thereon." And Lord Coke (2 Inst. 601, 602,) gave the resolutions of all the judges to the Privy Council in 1573 in answer to articles of abuses exhibited by the clergy, one of which was that prohibitions were granted at the suit of the defendant in the Ecclesiastical Court after his answer, and after pleadings and proofs on both sides, "yea, after sentence, yea, after two or three sentences given, and after execution of the said writs or sentences;" the answer (of the judges) is, "prohibitions are to be granted at any time to restrain a Court to interfere with or execute anything which by law they ought not to do, and they are much mistaken that maintain the contrary."

Further they say "the King's Courts that may award writs, being informed either by the parties themselves, or by a stranger, that any Court, temporal or ecclesiastical, doth exercise jurisdiction of that (whereof they have not jurisdiction), may lawfully issue the same as well after judgment as before." In *Buggin v. Buggin* (4 Burr. 2037), Lord Mansfield says, "If it appears upon the face of the proceedings that the Court below had no jurisdiction, prohibition may be issued at any time, either before or after judgment; because all is a nullity; it is *coram non judice*. But if it does not appear upon the face of the proceedings, if the Court below will lie by and suffer that Court to go on under its apparent jurisdiction (as upon a contract made at sea), it would be reasonable that this party who, when defendant below has been in by and concealed from the Court below a collateral matter should come hither after a sentence against him there, and set aside that collateral matter as a cause of prohibition, and obtain prohibition upon it, after all this acquiescence in the jurisdiction of the Court below." In *Roberts v. Humby* (3 Mees. & Wel. 127), Lord B., says, "I think a writ of prohibition may be granted before execution. All the cases where it has been held otherwise will be found to have turned on the acquiescence of the defendant."

[PARKE, B.—The question here is not if this motion is granted, but whether the County Court had not jurisdiction to do so. Unless you can remove the 80th section from the Act, we cannot interfere.] The object of that section is to prevent the necessity for defendant's *appearance* in order to judgment, not to deprive him of a right to notice of the proceedings. It is the latest injustice might be thus practised, and there would be no remedy. [PARKE, B.—On the other hand, there would be great inconvenience if we were to determine here the validity of the service of process in the County Courts.]

LOCK, C. B.—I am of opinion this rule should be discharged. I am not in favour of the clauses of the Act, and particularly at the 80th which directs what proceedings shall be adopted if the defendant does not appear, it is clear the County Court has jurisdiction over the matter, and the judge, upon due proof of service of summons, may proceed to the hearing of the cause on the

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part of the plaintiff only, and the judgment shall be as valid if both parties had attended. The term *due* must be that which is sufficient to satisfy the mind of the judge, and if he is satisfied that is enough. He has the power to give relief, as that section of the Act enables him, and he was willing to do so, but the defendant, it seems, declined to accept it.

PARKE, B.—I am of the same opinion. The effect of the section is in fact to place the judgment of the Court of inferior jurisdiction on the same footing as the judgment of the Superior Court. It would be very inconvenient if every judgment could be questioned here.

ROLFE, B.—I am of the same opinion. The reading of the 80th section is, that if the judge of the Inferior Court is satisfied as to the due service of the summons, he may proceed; but *Willes* reads it “on service of the summons, and due proof thereof.”

PLATT, B.—I think we should not interfere. It is peculiarly within the jurisdiction of the judge of the County Court; in the proceedings there does not appear that there is any ground to prohibit; the money may have found its way back into the party's own pocket.

Rule discharged

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JONES v. BROWN.

Privilege—Attorney—Costs.

An attorney is still privileged to sue in a Superior Court for debts and demands within the jurisdiction of the County Court, notwithstanding the provisions of the 67th and 129th sections of the County Court Act (confirming the decision of the Court of Queen's Bench in the case of Lewis v. Hance, ante, p. 75.)

A rule to deprive an attorney plaintiff of costs who has sued in a Superior Court upon a cause of action within the jurisdiction of the County Court will be discharged with costs.

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G. POLLOCK showed cause against a rule for leave to take a suggestion to deprive the plaintiff of costs. The case was brought to recover the amount of a bill of exchange. The plaintiff is an attorney, and the amount of the bill is less than £100. The question arises, whether a plaintiff attorney is compelled to sue in the County Courts, or whether he can exercise the priv-

ly decided that an attorney may sue in the Superior Court for a debt recoverable in the County Court, notwithstanding the 67th and 129th sections of the County Courts Act. In the 67th section, all pleas of personal actions for not more than 20*l.* holden in the County Court, without suit, and by the 129th section, if any action be brought in the Superior Court, for which might have been entered in a County Court, and a judgment found for the plaintiff for less than 20*l.* on contract, or otherwise, the plaintiff is to be deprived of his costs. If this rule were relied upon, there could be no doubt that the privilege of attorneys is not taken away; but it is contended that, by the 129th section, which enacts "that no privilege, except as is hereinafter excepted, shall be allowed to any person to exempt him from the jurisdiction of any Court holden under this Act," from the effect of the Act they are *exempt* from the jurisdiction. Now it may be said that a plaintiff is *within* the jurisdiction? All persons are exempt from the jurisdiction of every Court; they are not persons, and do not bring themselves within any jurisdiction; they please. Lord Denman, in his judgment in *Lewis v. Dyer*, says that the words in the 129th section are not stronger than the words in the 39 & 40 Geo. 3, c. 104, s. 12, where it is provided that no action be commenced in any Court other than the Court of Requests, for any debt recoverable in the Court of Requests, "and by a decision of the Court of Requests, the plaintiff shall not be entitled to any costs;" and by a decision of the Court of Requests, in *Board v. Parker* (7 East, 47), a plaintiff's costs do not lose his right to sue in the Superior Courts. The words are used in the 10 Geo. 3, c. 29; and in the Middlesex Court Act, 23 Geo. 2, c. 33, under which it has been held that attorneys plaintiffs are not included. There are many authorities upon the point. (*Hussey v. Jordan*, cited in the note to *Wright v. Lloyd*, Doug. 381; *Johnson v. Bray*, 2 Brod. & B.)

It is contra.—The intention of this Act was to take away

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POLLOCK, C. B.—The strength of the argument on the other side is this: there has been a current of authorities, going a long way back, in which the Courts have decided that the privilege of an attorney is not taken away unless by the express words of a statute. I must say that I do not think it is an inconvenient mode of coming to a decision to presume that the Legislature were aware of the state of the law at the time this Act was passed. Now, if the state of the law was, that by the use of certain words in an Act of Parliament the privileges of attorneys were not taken away, why should we now proceed to overrule all the cases that have been decided upon this point, and suppose that the Legislature intended that the words used in this Act should have more effect than the words used in former Acts—words that have been used in Westminster Hall, and to which have been attributed a specific meaning. We are all of opinion that the rule must be discharged.

G. Pollock.—I presume the rule will be discharged with costs.

POLLOCK, C. B.—There is an old rule of Court that whenever a rule is applied for with costs, and is discharged, it must be discharged with costs, besides which, the question here is raised upon the construction of a new Act of Parliament, in the language of many old Acts, which have already received a construction; the parties have acted according to the current of authorities, and should not be put to unnecessary costs, and if by this application such costs have been incurred, the party creating such costs ought to pay them.

ROLFE, B.—I think this is a much more reasonable ground than that of discharging a rule with costs, because costs have been asked for.

Rule discharged with costs.

Evidence—Replevin—Nul tiel record.

Declaration on a replevin bond set forth that A. H. levied his plaint in County Court held under 9 & 10 Vict. c. 95, against the present plaintiff, and a judgment by that Court that A. H. should take nothing by his writ, prout patet, &c. Plea, nul tiel record and issue thereon. A copy of the proceedings of the County Court was produced, stating that the cause had been "struck out for want of jurisdiction, on the ground of a disputed title having been sworn to." It was averred that as this entry did not support the averment in the declaration, the defendant was entitled to judgment.

He prayed for judgment for the plaintiff upon an issue raised upon a plea of *nul tiel record*. This was an action by the plaintiff of a replevin bond, who had been the defendant in an action of replevin in the County Court of the Whitechapel district, held under 9 & 10 Vict. c. 95, against one of the sureties to the bond. The bond was with the usual condition to prosecute the suit with effect, and the declaration set forth a plaint in County Court, and averred that such proceedings were taken and had, that afterwards and before the commencement of the present suit it was by the said Court considered and adjudged that the plaintiff in the said plaint should take nothing by his writ, *prout patet*. A certified copy of the entry of the plaint and proceedings between Abraham Hart, the plaintiff in the replevin suit in the County Court, and the present plaintiff, the defendant in that action, was produced, and the book of the Court, had been brought up by *certiorari*, as described in the copy as "Extracts from minutes of the proceedings at the Court so held on Tuesday the 26th day of October, 1847." Then followed the names of the plaintiff and defendant, and a memorandum that one appeared by counsel for the plaintiff, other by attorney, and then this minute, "Struck out for want of jurisdiction, on the ground of a disputed title having been sworn to."

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adjudicate upon it. [WILDE, C. J.—I cannot construe the words “struck out” as a judgment. The cause was not ended by that. [CRESSWELL, J.—Your argument is that the judge’s statement that he has no power to decide is a decision.]

J. Brown was not called upon.

WILDE, C. J.—The cause was not put an end to by striking it out of the paper. The allegation that there is such a record as that mentioned in the declaration is not supported.

CRESSWELL, J.—You have got to make out that there was a judgment: you only show that the cause was struck out. The argument is, that the judge must be taken to have decided, because he says he has no power to decide.

By the COURT,

Judgment for the defendant.

BAIL COURT.

Easter Term, 1848.

(Before Mr. Justice COLERIDGE.)

ZOHRAB v. SMITH.

Jurisdiction—Service of Summons—Discretion of Judge.

The judge of the County Court has an absolute discretion, from which there is no appeal, upon all questions of law and fact within his jurisdiction. A question as to proof of service of a summons under the 11th rule of practice is, therefore, entirely for the discretion of the judge, and the Court above will not interfere where he appears to have exercised such a discretion, even although in fact the summons had not been duly served.

Semble, that the jurisdiction of the County Court proceeds from the cause of action, and if that be within the jurisdiction, the subsequent proceedings cannot be revised by this Court.

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THIS was a rule calling upon the judge of the County Court of Bloomsbury and the plaintiff to show cause why a writ of prohibition should not issue to prohibit the said Court from further proceeding in this plaint, and from carrying into execution or otherwise giving effect to the said judgment of the Court, and why

Court should not be prohibited from paying the sum of £1., paid into Court under the said judgment, to any other person than the said defendant. It appeared that this was commenced in the County Court of Bloomsbury to recover for some fixtures. The summons was not personally served, but was left at the defendant's dwelling-house with the bailiff, the day of its return being the 23rd of December.

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Before that day the defendant applied to a judge at chambers for leave to remove the plaint into this Court, which was granted, but no *certiorari* was then issued, or before the return of the summons, on which day, the defendant not appearing, the plaintiff being prepared to try his cause, and having been given to the judge that the summons was served at the defendant's residence on the 11th of December, and the judge being satisfied that the 11th rule had been complied with, judgment was heard and judgment given for the plaintiff. Subsequently, on the 14th of January, the defendant applied for a rule, on the ground that the summons had not come to his residence until the 14th of December (not being ten clear days before return, as provided by the 11th rule), and in support of which he produced his servant and daughter, who spoke to the effect that the summons had not been left at the house until the 14th of December. In answer to this the bailiff was examined, who swore that he delivered it on the 11th of December at the house. The judge, after considering the evidence, said that, according to the defendant's evidence, he was of opinion that the summons had been served on the 11th of December, though it did not come to the defendant's residence until the 14th, but he thought the defendant had waived his objection by his application to a judge at chambers, but he reserved himself ready to grant a new trial upon the merits on which not being acceded to he dismissed the application. The amount of the judgment was afterwards paid into Court, and since then the *certiorari* has been issued, pursuant to the order of Mr. Justice Erle. The present rule was obtained on the ground that as there was no evidence of the summons having been served on the knowledge of the defendant ten clear days before the return (pursuant to the 11th rule made under the 9 & 10 Vict. c. 8), the judge had no jurisdiction to try the cause. The question provides "that in all cases where a summons to a plaintiff shall not have been served personally, and the defendant shall not appear at the return-day, it must be proved to the satisfaction of the judge that the service of such summons has been made on the knowledge of the defendant ten clear days before the return-day."

Mr. Q. C. and *Hawkins*, showed cause and contended that if on the 11th of December it was proved to the satisfaction of the judge that the service of the summons had come to the knowledge of the defendant, as provided by the 11th rule, it was sufficient to give jurisdiction to hear and determine the cause, which it appeared from the facts had been the case; and that it was immaterial that,

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on the motion for the new trial, his opinion upon the subject have been altered; and that this Court will not interfere upon point of practice, when the question has been properly before Court below, and adjudicated upon. (a)

Willes, contra, contended that it sufficiently appeared that summons, in fact, never came to the knowledge of the defendant until the 14th of December, being within the ten days provided by the 11th rule, of which the judge was convinced on the argument for the new trial; and that being so, he had no jurisdiction to try the cause.

COLERIDGE, J.—There are some points in this case which they had been material to the decision of it, I should have time to have considered; but I think I can well dispose of the case upon a very plain and intelligible ground. A writ of prohibition never issues merely because a step taken in a Court below has been unwise or unjust, nor because we may think a decision unsatisfactory, but only because we find that the Court has exceeded, or is about to exceed, its jurisdiction. Now, in the present case, the Inferior Court has acted upon two occasions, on the 23rd of December, and again on the 14th of January, on the first of those occasions it is said that it acted without jurisdiction. Let me concede, for the sake of argument, that on the first of those occasions the due service of the summons is a precedent to the Court entering upon the case, and this is still the case most strongly for the defendant; the rule directs that in cases where a summons to appear shall not have been served personally and the defendant shall not appear on the return, it must be proved to the satisfaction of the judge that the service of such summons has come to the knowledge of the defendant ten clear days before said return-day. There is certainly no direct evidence of what form of proof was before the judge upon the 23rd of December, but it is sworn that it was to the satisfaction of the judge; whatever the proof may have been, whether it was to his satisfaction or not, was for him to determine, and although I may say if I had been in his situation and had heard the proof or seen the affidavit I may not have been satisfied, it was a matter entirely within his discretion, with which I cannot interfere. But when we argue as though it were necessary to originate jurisdiction, this proof should be given, I by no means wish it to be understood that such is my own opinion, for I should say that it is entirely another way, and that if the cause is within the jurisdiction of the Court, this is merely a rule to direct the judge in the exercise of that jurisdiction. It may be compared to a notice of trial. If a notice of trial had been given in an action in one of the Superior Courts, it would certainly be a ground for a new trial, but in the County Court notice would not be necessary to give jurisdiction to try. It is much, therefore, as to what took place on the 23rd of December

(a) Other points were discussed, but they become immaterial, as the judgment was founded upon the foregoing alone.

as to the proceedings on the 14th of January. The defendant then before the Court, and what then took place is very strong at the argument of Mr. Willes; for the judge then said, "I am now satisfied that the summons was served on the 11th of January, but not that it came to the knowledge of the defendant on the 14th;" and he might well say so on that occasion, and on his opinion on the conflict of evidence, that if all those facts were brought before him on the 23rd of December, he should have decided as he did. But this has nothing to do with his opinion upon the 23rd of December, which is the occasion to which we must look. Upon this short point I think the rule must be discharged. There may be a hardship upon the defendant in having money locked up as it is, and something ought to be done; but we must not interfere in this way.

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Rule discharged without costs.

COURT OF QUEEN'S BENCH.

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HARTLEY v. AYURST.

Dividing causes of Action—Prohibition.

The plaintiff had brought two actions in the County Court against the defendant, one of tort for an assault, the other on contract for the amount of a surgeon's bill incurred by reason of the assault. It was shown that these were distinct causes of action, and might be separately tried for in the County Court.

IT was a rule calling upon the plaintiff in two complaints in a County Court to show cause why a prohibition should not be granted to stay further proceedings, upon the ground that the cause of action had been improperly divided, for the purpose of bringing two suits, in contravention of the provisions of sect. 63 of the County Courts Act. It appeared from the affidavits that one of the complaints was in tort, for an assault, and the other for the amount of a surgeon's bill incurred by reason of the assault. The plaintiff and his counsel now showed cause, and submitted that the two causes of action were distinct. The County Courts Act and

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the rules of practice recognized two kinds of action, and two one on contract, the other for *tort*. The jurisdiction in these different, the fees and the costs differed; although a concurrent jurisdiction was given to the Superior Courts, without subjecting the party suing there to the loss of his costs, where a verdict less than 5*l.* was obtained in *tort*, he was not protected unless he obtained a verdict for more than 20*l.* in contract. The jurisdiction of the Court and the rights of the parties thus differing in the forms of action, they could not be one cause of action within the meaning of the 63rd section, so as to prevent the plaintiff from bringing separate actions.

Pashley in support of the rule contended that inasmuch as an action of trespass for the assault in the Superior Court might have recovered damages for the surgical expense to which he had been put, he was not entitled to separate the action from the County Court, for that in fact they constituted one cause of action.

PATTESON, J.—Do you mean to contend that if there had been a positive agreement between the parties that this bill should be paid, such a contract could have been joined with the *tort* even in the Superior Court? If you say that no action would lie upon the agreement, then it is no part of a cause of action. On the other hand, you say that such an action would lie, it is so a distinct cause of action from the assault. But the County Courts Act expressly distinguishes actions of *tort* and on contract, and I doubt if in any case they could be joined.

WIGHTMAN, J.—I granted this rule in the Bail Court without mistake; I understood that both the actions were *in tort*.

Rule discharged.

COURT OF COMMON PLEAS.

Easter Term, 1848.

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diction—Question of title—Incorporeal hereditaments.

erty to an action in the County Courts sets up an assertion of claims exemption therefore from the jurisdiction, under the 58th section of the County Courts Act, the Court is not, on the assertion of such claim, forthwith ousted of its jurisdiction, but the Judge may proceed to hear and determine if such claim of title is real and substantial, and if of opinion that it is not so, he may give judgment.

On an action of trespass, defendant claimed for himself, as an inhabitant of the town of B., a right by immemorial custom to enter plaintiff's land to take fish :

That such custom of profit à prendre in the soil of another cannot be proved, and that the jurisdiction of the Court could not be ousted on the ground of a custom that has no existence.

That the 58th section would not extend to such a case as this, as the claim in question is not to a hereditament, corporeal or incorporeal, and therefore it would not be one of the exceptions from the jurisdiction of the County Courts.

MR. SERJEANT URD, Serjt., showed cause against a rule obtained by Mr. Lloyd, in Hilary Term last, calling upon plaintiff to show why a writ of prohibition should not issue to the Judge of the County Court of Merionethshire, on the ground that the dispute between the parties was one of title, and that therefore the County Court had no jurisdiction over this case. The facts of the case were these. Plaintiff has an estate near Bala, through which flows the river Trewerwyn. Defendant resides in Bala, and has a right to fish in the said river, which privilege he claimed by prescription as an inhabitant of Bala. Defendant found a right of common, and a right of path by the said river. An action of trespass was brought by plaintiff against defendant in the County Court. The case was heard on the 14th of January, and damages given to plaintiff for the trespass alleged. Defendant contended that the right of common cannot be maintained by prescription in this case. The affidavits on which the rule nisi was granted do not show that the defendant has property in the town of Bala, or that he is even a householder there. He does not show that he has a right of common centering in himself; nor, if he has, that he has been deputed to act as their servant. The same, in like manner, is not asserted as a privilege arising from property possessed by the defendant in the town of

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Bala. The terms of sect. 58 of the County Courts Act, under which it is attempted to be shown that the Court had no authority to adjudicate in this matter, goes to this: "that the Court shall not have cognizance in any action in which the title to any corporeal or incorporeal hereditaments shall be in question." It can reasonably be contended that title to an incorporeal hereditament comes here in question. The legal definition of "an incorporeal hereditament" destroys all ground for such a pretence. The pretence by which defendant sought to support his assumed right that of nine inhabitants of Bala, among the oldest in the neighbourhood, who swore that, until the year 1840, the inhabitants of Bala enjoyed the right of fishing in the Trewerwyn and other streams. They stated that there was a path by the river. To rebut this, plaintiff showed that the river was not navigable and was entire property; that the estate through which it flowed had been in possession of his family since the year 1685, and that he never knew nor heard of any claim by the inhabitants of Bala to a right of common in his lands, or of fishing in the river. It was shown that the inhabitants had been, until within a few years, allowed to fish there; but this was a matter of grace and favour, and not concession of a right, and when found inconvenient, it was withdrawn. If the defendant had the right he claimed, it should be transferable to another; he would be able to dispose of it. We cannot see how any one could contend that such a right was possessed by the defendant. Such a position is not maintainable; it would give one person a privilege of *profit à prendre* in the soil of another, which cannot be done, and for this reason it is submitted that this rule should be discharged.

Morgan Lloyd, in support of the rule.—The jurisdiction of County Court is ousted in this case by the 58th section of 9 & 10 Vict. c. 95, which enacts, that the County Court shall have cognizance of any case in which the title to an incorporeal hereditament shall come in question. The defendant claims a right of way and also a right of common of fishery. A right of way is an incorporeal hereditament: (2 Steph. Commen. 11; 2 Coleridge's Blackstone, 34.) A right of common of fishery is also an incorporeal hereditament: (2 Steph. Comm. 3, 9.) The defendant in this case, previous to the trespass subject of plaint in the Court below, caused a notice in writing to be served on the plaintiff, that he would go on plaintiff's land to fish, in assertion of a right which he claimed as one of the inhabitants of Bala. A notice was also served on the clerk of the Court, previous to the trial. This was sufficient to oust the Court of its jurisdiction, without any further proof of the right. This has been decided in *Kinnersley v. Orpe* (2 Douglas, 517); and in *Caghey v. McCoy* (1 Crawford & Dix. C. C. 290). In the latter case, Pennefather, J. held, that as soon as it appeared that the defendant had, before the commission of the trespass, given notice of his intention to enter on the plaintiff's land, in assertion

of way, the assistant barrister was ousted of his jurisdiction in the case. Immediately on this cause being called on the defendant orally pleaded a right of common of piscary, and of way. This plea deprived the judge of jurisdiction to try the case: (*Tinniswood v. Pattison*, 3 C. B. 243.) There it was held that the jurisdiction of the ancient County Court was ousted by a plea pleaded which might bring title to land in issue.

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The case of *Batty v. Thompson*, in the Queen's Bench, was authority to show that a prohibition ought to go whenever a claim of right is made, whether the right really exists or not.

In the present case, it appears that there was a *bonâ fide* claim of right, and the judge of the County Court had no authority to say whether such a right did really exist or not. But it only was there a claim made, but such a right did, in fact, exist. The affidavit states that it was proved by a number of witnesses before the judge of the County Court that the inhabitants of Bala have always exercised the right of path claimed, the right of fishing. These are rights that may exist in fact. The right of path may be claimed by inhabitants as such: (1 Com. 11.) Inhabitants may claim easements in the land by custom: (*Fitch v. Rawlings*, 2 Hen. Bl. Rep. 406.) The rector of a place may claim for himself and the inhabitants. Bala was anciently a town, and the inhabitants might prescribe as a corporation.

Their ceasing to be a corporation would not deprive them of this right; at all events, it is an arguable point whether it would or not. [COLTMAN, J.—How can this right be claimed by a man who might fish and sell what he caught. It is a *profit à prendre*.]

I am well aware that a *profit à prendre* cannot be claimed by custom. The law is so laid down in *Marlowe v. Marlowe* (4 T. R. 717); and *Blewitt v. Tregonning* (1 E. 554); but there are exceptions to the general rule. In *Rogers v. Brenton* (17 L. J. 44, Q. B.), the Court in the Queen's Bench lays it down, that though the general rule of law is that a *profit à prendre* cannot be claimed by custom, still, if it clearly appears that a right does exist, and that the person claiming it is entitled to such a right cannot prescribe, they are allowed to claim it by custom. Thus, if in this case a jury find that the inhabitants of Bala had an undoubted right in the Trewerwyn, the law would not allow them to be ousted of such a right, because they could not prescribe, but in the words of Lord Denman, "from necessity, and that an undoubted right might not be defeated," allow them to claim it by custom. Here, therefore, it appears that rights to incorporeal hereditaments do exist, or, at all events, that they may exist. They appeared before the judge in the Court below. The judge proceeded without authority to try the case; and even if it did not so appear, a *bonâ fide* claim was made, and this ousted him of its jurisdiction; therefore it is submitted that this claim could be made absolute.

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WILDE, C. J. now delivered

Judgment.

In this case a rule was obtained on the part of the defendant, calling upon the plaintiff to show cause why a writ of prohibition should not issue, to be directed to the Judge of the County Court of Merionethshire, to stay further proceedings in this case. The ground on which the defendant claimed to be entitled to the writ is, that the action is brought to recover damages for an alleged trespass, the defendant having entered the plaintiff's land and fished, or attempted to fish, there; the defendant contended that such act was done in the exercise of the right conferred on him as an inhabitant of the town of Bala, under an immemorial custom; and as the claim of right set up by the defendant under this custom may be disputed, it was contended that the jurisdiction of the County Court over the case was excluded by the statute of the 9 & 10 Vict. c. 95, s. 58, by which it is provided the Court shall not have cognizance of any action in which a claim to an incorporeal hereditament may be disputed. The affidavits filed in support of the rule state the defendant to have been an inhabitant of the town of Bala, and that an immemorial custom exists there conferring the right before mentioned upon the inhabitants of that town, and that the alleged trespass was committed by the defendant at the instance or request of the several inhabitants associated there for the purpose of asserting the existence and validity of the custom set up. The affidavits read in answer to the rule deny the existence of the custom in point of fact, and state that the defendant was not a householder; that he is a person having no visible means of support, and is wholly incompetent to pay any damages or costs which may be recovered against him. Having heard the arguments in support of the rule, we are of opinion the jurisdiction of the County Court over the case is not excluded by the provision referred to in the statute 9 & 10 Vict. c. 95, s. 58, and that the rule must be discharged. The custom set up is in effect a custom for the inhabitants of Bala as such to have a *profit à prendre* in the soil of another; but we think no question can be said to arise in this case regarding such a custom, as it has been held as clear and undoubted law for two centuries that no such custom can exist in point of law. The question was determined in the fourth year of James I. in *Gatewood's case* (6 Coke, 60 a), that such a custom is void in law and since that case the law has been considered as settled, and is not now open to question or doubt. The jurisdiction of the Court cannot be excluded by a pretence of a custom which has been so long and solemnly determined to have no valid existence. Be further, supposing any question could arise regarding the custom still the circumstances would not bring the case within any of the cases referred to over which the jurisdiction of the County Court is excluded by the 58th section, inasmuch as that section excludes the jurisdiction in cases involving disputed claims of incorporeal

hereditaments; and the claim in question is not properly a claim to a hereditament. Hereditament is defined in the text-books and authorities to signify all such things, whether corporeal or incorporeal, which a man may have to him and his heirs, by way of inheritance, which, if they were not otherwise bequeathed, would come to him, that is, as next of blood, and not pass to executors and administrators as chattels do. (See *Termes de Ley*, Co. Lit. 6 a. and Co. Lit. 6 b.) It is obvious the right claimed under the custom alleged is not a claim to a hereditament, and therefore not such as to exclude the jurisdiction of the County Court; the rule, therefore, must be discharged with costs.

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Rule discharged.

BAIL COURT.

Trinity Term, 1848.

(Before Mr. Justice WIGHTMAN.)

LILLEY v. HARVEY.

OWEN v. PIERCE.

Jurisdiction—Claim of title.

In order to oust the jurisdiction of the County Court by a claim of title to hereditaments, under the proviso contained in the 58th section of the County Courts Act, such claim must be bonâ fide and substantial, and in order to determine if it be so, it is competent for the judge to hear the evidence that he may ascertain if the case be within the terms of the proviso. The mere assertion of title by the defendant is not, of itself, sufficient to oust the jurisdiction of the County Court.

When, however, the judge has heard and determined that the case is within his jurisdiction, this Court will review his decision upon that point only, and if of opinion that he has wrongly decided, and that the case came under the proviso in the 58th section, a prohibition will be granted.

THE first of these cases was an application made by *Naylor* for a prohibition to be directed to the judge of the County Court of Cambridge, to restrain him from further proceeding in an action brought by the plaintiff to recover the sum of 20*l.* for use and occupation of certain premises, which, on the hearing, the defendant claimed as his own property, and denied the jurisdiction of the judge to adjudicate upon.

Burcham having shown cause,

Cur. adv. vult.

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This also was a rule for a prohibition to the judge of the County Court of Carmarthenshire, to restrain him from entertaining the cause, the defendant setting up a claim to an incorporeal hereditament.

Townsend, in support of the rule.
Welsby, contra.

Cur. adv. vult.

Judgment.

His Lordship pronounced judgment in the two cases as follows:—These are two cases as to the power of a judge of the County Court to proceed after the defendant had stated that the question involved the right to incorporeal hereditaments. The question is, whether the title to the hereditaments came into question, so as to take the cases out of the jurisdiction of the County Court. The demand was for use and occupation, and the defendant objected to the jurisdiction on the ground that he claimed the premises as his own, and consequently that the title was in question. The judge of the County Court examined the defendant, who stated that he believed the premises were his, and he purchased them. The judge went on with the case, and decided for the plaintiff, being of opinion that the title did not come in question, and I am of opinion there was no real ground for the objection. The defendant did not pretend that he had any conveyance, or that he had possession, or that he had paid for them. On the other hand, the plaintiff had been in possession for twenty-five years, he had a conveyance and had paid the purchase-money, and the defendant, in 1842, had taken the premises of the plaintiff as tenant, and had paid rent to him till 1846, and it further appeared that, in June, 1847, the plaintiff had distrained the goods of the defendant for the arrears of rent, and the goods were sold without a replevin. On a subsequent occasion, when there was a question whether the defendant's son was not a joint tenant with him, the defendant had sworn that he had taken the premises alone. It was contended for the defendant, and this is common to both cases, that it was enough for the defendant to state on oath that he believed the premises were his, to bring the cases within the proviso, and that the judge had no authority to interfere further. It appears to me that the judge has authority to inquire whether or not the title is in question. It is difficult to define the limits to which his inquiry may go. It was hardly intended that the mere assertion of the defendant will suffice to take away the jurisdiction; the judge must be satisfied that the title is in question, and he must inquire into so much of the case as to satisfy him upon that point. Where there are special pleadings, and the question is raised upon them, the judge can go no further; but if the question is not raised upon the pleadings, but merely suggested by the defendant, the judge must inquire into the case before he can be satisfied that the title can come in question. If he is wrong, and assumes a jurisdiction when the title is really in question, the

and to consider that the title was really in question. In the case I consider the judge of the County Court was right, ^{investigate a claim of title.} rule must be discharged in *Lilley* and *Harvey* with costs.

There is more doubt with respect to the case of *Owen* and *Pierce*, where it appears there was an action of trespass for taking the plaintiff's cattle. The defendant, upon appearing in the Court, objected that he had a prescriptive right for his cattle to go onto the land of the plaintiff, there being a countervailing interest on the part of the plaintiff that his cattle might stray into the land of the defendant, and without there being a liability for trespass on either side. It is not necessary to decide the law upon either matter: the question before the County Court was, whether the right of incorporeal hereditament did really come in question; and the judge seemed to be of opinion that it did not come in question between these parties. As is usual in these cases, the defendant made the objection, and stated he claimed a right by prescription; and he adopted the very term suggested in the case in the Queen's Bench. On the other hand, there were some circumstances tending to show that there was no foundation for the objection taken by the defendant; and, in the first place, it seems, that was the case that he had ever set up such a claim. It does not appear that he had ever, down to this time, claimed such a right; and it is clear that he had offered to give 5s. a year as compensation for trespass, which the plaintiff had refused. I think, upon the whole, there is no sufficient ground for assuming that the title was in question. It is not for the judge to determine whether the title was well founded, but whether it came in question. I will discharge the rule in both cases.

Rule discharged.

COURT OF QUEEN'S BENCH.

Trinity Term, 1848.

ACWORTH AND ANOTHER v. DOWSETT.

Prohibition—Splitting demands.

Prohibition will not issue after judgment and execution, in a case where the defect does not appear on the face of the proceedings.

Where a plaintiff had split his demand, and obtained judgment in two actions for the same "cause of action" under the decision in Grimbley v. Aykroyd (1 Cox & Macrae, 79), and it appeared, from the particulars of demand annexed, that two plaints had been entered on the same day by the same plaintiff, against the same defendant, for goods sold and delivered:

Held, that this was a sufficient defect apparent upon the face of the proceedings to enable this Court to issue a prohibition against proceeding in the second action.

Prohibition will issue after judgment and execution levied but not satisfied.

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AND ANOTHER
v.
DOWSETT.

PEACOCK showed cause on Thursday last against a rule for a prohibition to prohibit the judge of the County Court of Essex, the plaintiffs in two actions which had been brought there, and the high bailiff of the Court, from taking any further proceedings in the said actions. It appeared that the plaintiffs had split their demand, and brought two actions for goods sold and delivered; the one for 14l. 14s. 11d., and the other for 12l. 2s. 4d. Judgment had been given and execution levied, but not satisfied; and the question before the Court appeared to be, whether prohibition would go after judgment and execution in a case where the defect did not appear on the face of the proceedings.

LORD DENMAN, C. J., said, he thought it clear that prohibition would not lie, unless the defect appeared on the face of the proceedings, and ordered the case to stand over till to-day, in order that a report might be obtained of the case "*Grimbley v. Ackroyd*," which had just been decided by the Court of Exchequer, and that Mr. Charnock might search for further authorities.

Charnock now contended that the defect did appear on the face of the proceedings. The plaintiff was bound to file a particular of his demand, which was annexed to the plaint, from which it appeared that two plaints were made on the same day for goods sold and delivered. Even if it had not been so, he contended that, according to the authorities which he cited, prohibition would go at any time, even after execution, though the defect did not appear on the face of the proceedings. If it were not so, debts of any amount might be recovered in the County Courts, for during the

vacation application could not be made to this Court for prohibition, and a judge at chambers had no power to issue the writ.

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Peacock contended that the defendant ought to have appeared in the County Court, and informed the judge that the plaintiff had a claim for a further sum, and that the Court had no jurisdiction to try the cause. If the judge had then gone on, the judgment would have been erroneous, and it would have been a ground for prohibition. The judge was not bound to know that the plaintiff had another claim.

LORD DENMAN, C. J.—It is not the judge who has done wrong, but the plaintiff.

WIGHTMAN, J.—The 63rd section says, that it is not lawful for the plaintiff to go on in such a case.

The COURT, after some further discussion, ordered the rule to be made absolute, without costs, to prohibit any further proceedings in the second action, the defendant undertaking not to bring any action in respect of the second action.

COURT OF QUEEN'S BENCH.

Trinity Term, 1848.

WICKHAM v. LEE.

Prohibition—Splitting demands—Double value.

Plaintiff brought two actions in the County Court against the defendant, one for £19. 8s. 4d. rent in arrear, the other for £9. 14s. 2d. for double value for holding over after notice to quit, under stat. 4 Geo. 2, c. 68, s. 1.

Held, that these were distinct "causes of action" within the meaning of that term in the County Courts Act, and might be made the subjects of separate plaints.

Held, also, that the County Court has jurisdiction in such action for double value, it being "a plea of personal action."

Where the parties had consented, in order to get rid of the objection that plaintiff had divided his demand, that he should be nonsuited on one of the plaints, and he was nonsuited accordingly,

Held, that this consent was a waiver of the objection.

THE Attorney-General showed cause against a rule calling on the judge and bailiffs of the County Court of Winchester, and the plaintiffs, to show cause why a writ of prohibition should not issue to prevent them from proceeding with several plaints

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value.

entered in that Court. This application is answered by the :
The plaintiffs sued in the County Court as executors, and the
plaint (No. 115) is for £19. 8s. 4d. for one year's arrear of
from September, 1845, to September, 1846; the second (No.
is for the rent from September, 1846, to September, 1847
third (No. 117) is for £9. 14s. 2d. for double value for ho
over one quarter after notice to quit; and the fourth and
(Nos. 118 and 119), are in ejectment to recover possession o
property. Upon the trial before the judge of the County C
it was objected that the plaintiff had split his demand in ord
bring it within the jurisdiction of that Court, and the les
judge then suggested, in order to obviate that difficulty, tha
plaintiff should be nonsuited on plaint No. 116; and that No.
should be struck out. That suggestion was assented to by
parties, and the plaintiffs accordingly recovered only one y
rent upon plaint No. 115, and double value for one quarter u
plaint No. 117, and had judgment on plaint No. 118 of posse
in ten days. Therefore, as to the two years' arrears of rent,
objection, if it were valid, would be cured by the consent;
it is not valid; for each year's arrear gives a separate caus
action, and is wholly different from the items of a tradesman's
As to the plaint for double value, that is beyond all doubt fou
upon a separate cause of action. It is an action of debt
a penalty, and is not rent at all. It assumes the relation of l
lord and tenant to have been determined. With regard to
recovery of possession, s. 127 of the Act (9 & 10 Vict. c. 95) p
out a remedy by action. By section 126 a bond is to be ent
into, not unlike a replevin bond; and in this very case the ju
fixed the amount; but the bond has not been executed.
effect of entering into that bond would be to suspend execu
upon the judgment (s. 126), which is all that could be effe
by the writ of prohibition; and that specific remedy being gi
prohibition does not lie. It was said that the title was in disp
but, in truth, the affidavits show that that was not so.

Smirke, contra.—The principle of the decision in *Grimble
Aykroyd* (17 L. J. Exch. 157), applies to all arrears of a run
account, and therefore to arrears of rent; but independently of
two plaints for the two years' rent, there is the third plaint
double value, which is not a distinct cause of action. A count
double value may be always joined with a count for use
occupation; and it is double the rent which is recovered. [C
RIDGE, J.—An action for double value does not admit a tena
On the contrary, it has been held that it may be maintained a
judgment recovered in ejectment.] There may be some do
whether this action is within the jurisdiction of the County Co
[ERLE, J.—The statute says, "all pleas of personal actions u
20L" (s. 28.) There must be some limitation to that; no pro
has, for instance, been provided for an action of *detinue*. It m
perhaps, be admitted that as to plaints 118 and 119 the Act
Parliament points out another remedy.

DENMAN, C. J.—It is quite clear that consent removes objection. With respect to the double value, that is a cause of action, over which the County Court has juris-

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ESON, J.—It is clear to me that the first objection is cured; and as to the second, the plaint is not for rent at all. Statute 4 Geo. 2, c. 81, s. 1, expressly speaks of double the rent, and afterwards says "against the value of which said penalty" no relief shall be given in equity. It is not to be distrained for; which also shows that it is not rent. It is said that a count for double value may be joined with a count for use and occupation; but I do not understand that the Court of Exchequer has gone the length of saying that wherever a count for double value may be joined they *must* be joined; to me it seems that this is quite a distinct cause of action; and independent of the question of splitting, I think that the County Court has jurisdiction over an action for double value.

BRIDGE, J.—Of the several questions raised here there is one, I think, capable of argument. As to the alleged splitting of demands, 115 and 117, no doubt a count for use and occupation and a count for double value may be joined; but they stand on different footing; they assume the parties to fill a different relation; the causes of action are quite distinct. Then, is the action for double value within the jurisdiction of the County Court? It is said that the words "a personal action under 20*l*;" and there are express words to take it out. It is said that this is rather inconsistent with detinue, and that detinue would not lie in the County Court, no process having been provided for that action; but if the question arises, it will be time enough to decide it; but I observe that detinue is an anomalous and peculiar proceeding—that as to the plaint for double value I entertain no doubt.

BRIDGE, J.—I collect from the decision of the Court of Exchequer that the plaintiff is not open to the objection of splitting his demand. In the Superior Courts two counts would have been admissible. If they must have had two counts, they may have brought them in the County Court. That I gather from the judgment of the Court of Exchequer. As to the other objection, that the case is in dispute, this is the case of premises held under a lease for less than 20*l*. and is clearly within the jurisdiction of the County Court by the express terms of the statute. If other questions of title were gone into, the statute has provided the mode in which that error is to be rectified.

Rule discharged with costs.

COURT OF COMMON PLEAS.

Trinity Term, 1848.

BAILEY v. ROBSON.

Suggestion—Affidavit.

In an application for leave to enter a suggestion to deprive plaintiff of costs for having brought an action in the Superior Court for a cause of action that was within the jurisdiction of the County Court, it is necessary that the affidavit should expressly show every particular requisite to give jurisdiction to the County Court, and negative every exception.

Therefore, where the affidavit omitted to show that the cause of action arose wholly or in some material part within the jurisdiction of the County Court within which defendant resided at the time of action brought, or that he had resided there within six months, the application for leave to enter the suggestion thereupon was refused.

BAILEY
v.
ROBSON.

LUSH showed cause against a rule obtained on a former day calling on plaintiff to show cause why defendant should enter a suggestion on the record to deprive plaintiff of his costs, the verdict being for 3*l.* 15*s.* 9*d.* Plaintiff lives at Wapping, in the county of Middlesex, and defendant resides nine miles distant, in the county of Kent. The affidavit on which rule was had been obtained showed that the cause of action arose in Middlesex, but that defendant, at the time of bringing of the action, lived in Kent. The defendant has not by this affidavit mentioned the provisions in the 128th section of the Act, which give a concurrent jurisdiction to the Superior Courts, and, therefore, the rule does not come within the 129th section of the Act, which, under certain circumstances, deprives plaintiff of costs. The affidavit should have shown that the cause of action arose within the jurisdiction of the County Court wherein defendant resided at the time when action was brought.

Simon, in support of the rule.—It is sufficient if it be shown that the defendant lives within twenty miles of plaintiff, which has been done, and it is unnecessary also to depose that the cause of action arose within the jurisdiction of the Court within which defendant dwells. [WILLIAMS, J.—It is not a question whether jurisdiction exists, so much as whether plaintiff was compelled to resort to it.] It is submitted that it is enough if it be shown that plaintiff may go to the County Court. [WILDE, C. J.—To show he may go is not sufficient; you must show he must.]

By the COURT.—There is nothing shown in the affidavit to prohibit plaintiff's election to sue in the Superior Courts, and the rule for entering a suggestion must therefore be discharged.

Rule discharged.

COURT OF COMMON PLEAS.

Trinity Term, 1848.

MEETAN v. NICHOLLS.

Suggestion—Affidavit.

*avit in support of an application to enter a suggestion to deprive
 stiff of costs for having sued in a Superior Court for a cause
 on that was within the jurisdiction of the County Court must
 re the exceptions to the jurisdiction of the County Court, by
 y that defendant did not come within either of such exceptions.
 e where the affidavit did not show that the defendant in the Court
 was not an officer of the County Court, it was
 be insufficient, and leave to enter the suggestion thereon was
 L*

ION on two bills of exchange. Verdict for 14l.

ash showed cause against a rule which had been obtained
 fourd, Serjt., on a former day, calling on the plaintiff to
 use why the defendant should not be permitted to enter
 ction on the record, under the 9 & 10 Vict. c. 95, to
 the plaintiff of his costs. In this affidavit it is not stated
 ; plaintiff and defendant are not officers of the County

It is quite consistent with the affidavit that one or both
 may be such officers; therefore they may be within the
 n contained in the 128th section.

DE, C. J.—Is there any difference between that part of
 th clause which relates to officers, and that which relates
 ause of action arising within the jurisdiction of the Court?
 u therefore omit to negative one more than the other?

urd, Serjt., in support of the rule.—It has been shown
 e parties lived within twenty miles of each other. It is
 ed that if the affidavit shows that the case comes within
 rt of the 58th section which gives jurisdiction to the
 Court, it is sufficient. To take it out of that Act is
 which should come from the other side. [CRESSWELL, J.
 128th section seems to apply to some particular actions as
 some particular persons. The 129th section takes away
 om plaintiff in actions brought in the Superior Courts
 y cause other than those lastly hereinbefore specified.”
 ; words are not to be so construed as to take in officers
 County Court, they will not apply to all in the 128th
 .] It is admitted that the words “other than those lastly
 before specified,” includes officers of the County Court, as

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mentioned in the preceding (128th) section; but it is contended such are by way of proviso, which exempts the plaintiff from being compelled to sue in the County Court, and as such should be made out by the plaintiff. It may not be in the knowledge of the defendant that the plaintiff is an officer of the County Court. [WILDE, C. J.—You don't show he is not.] The Court in other cases have decided that the affidavits must not only show that the jurisdiction is in the Inferior Court, but that the parties live within twenty miles of each other. It is necessary to admit the excepted cases. [CRESSWELL, J.—You must show that this statute takes away what the Statute of Gloucester gave.]

WILDE, C. J.—The objection to the affidavit is a good one, and the affidavit is clearly defective for not showing that the parties to the action are *not* officers of the County Court. The Act 9 & 10 Vict. c. 95, reserves to the parties mentioned in the 128th section the rights they possessed before the passing of the Act. In endeavouring to deprive plaintiff of what *prima facie* he is entitled to, it must be shown how his rights have been taken away.

COLTMAN, J.—On consideration, I think that all the cases in the 128th section, in which a concurrent jurisdiction is given to the Superior Courts, must be negatived in the affidavit to deprive a plaintiff of costs. There has been no decision hitherto on this part of the section.

CRESSWELL, J.—Costs are taken away only in certain cases; it must be shown by the defendant that plaintiff comes within one of the cases so excepted, and this has not been done.

Rule discharged.

COURT OF COMMON PLEAS.

Trinity Term, 1848.

MATHEW v. BROUGHALL.

Suggestion—Affidavit.

Application for leave to enter a suggestion to deprive the plaintiff of his costs for having brought an action in the Superior Court for a debt was within the jurisdiction of the County Court, it is necessary the affidavit should expressly state the facts that go to establish the defendant was within the jurisdiction of the Inferior Court at the time of the action brought.

Where the affidavit omitted to aver that at the time of action the defendant dwelt or carried on his business within the jurisdiction of the County Court, this Court refused leave to enter a suggestion to deprive the plaintiff of his costs.

IT for goods sold and delivered. Venue Middlesex. Verdict for a sum below 20L

The Serjt., had obtained a rule calling on the plaintiff to show cause why the judgment signed in this case, and execution thereon, should not be set aside for irregularity, and why, in the event of judgment being so set aside, the judgment to be signed and entered up in this cause should not be for the amount of the debt covered on the trial, without costs; or why the plaintiff should not forthwith carry in the record in this cause, and the defendant be at liberty to enter a suggestion thereon to deprive the plaintiff of his costs; and why, in either case, the plaintiff should be ordered to pay to the defendant or his attorney his costs of this application to the Court, to be taxed by one of the Masters of this Court. The defendant moved for under the City of London Small Debts Act, 1847, s. 11, and the general County Courts Act, 1846, s. 95.

The affidavit on which this motion was made was sworn to by the clerk to defendant's attorney, and read as follows:—"The said deponent maketh oath and saith that the plaintiff is a wholesale butcher, carrying on business in the City of London, in the parish of St. Martin in the Vintry, which is within twenty miles of the place where the defendant lives and carries on his business; and deponent further saith that the defendant is a retail butcher, residing and carrying on his business in High-street, Finsbury, in the parish of St. Giles, in the county of Middlesex, and deponent further saith that the cause of action arose within the jurisdiction of the Court of Middlesex, within which the defendant dwells and carries on his business, *as he verily*

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v.
BROUGHALL.

The Serjt., for plaintiff, showed cause.—The affidavit used in support of the defendant itself shows he has no grounds to stand

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BROUGHALL.

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1848.

Suggestion—
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on. He has even taken pains to show that he does not come within the Act. The affidavit made by the clerk to defendant's attorney, so far as 10 & 11 Vict. c. 71, is concerned, does not avail, for it is there sworn that the cause of action arose in Middlesex. In order to bring the plaintiff within the 129th section of the general County Courts Act, and deprive him of costs, the defendant ought, by affidavit, to have negatived the exception to the 128th section. The affidavit does not show that he comes within either of those clauses. The affidavit, again, does not show that neither the plaintiff nor defendant were officers of the County Court, nor does it state that defendant was resident within the jurisdiction of the Court within six months before action brought. Consistently with this affidavit, an officer of the County Court may be a party to this action, or defendant may have come to reside within the jurisdiction of the Court since the commencement of the action. *Thorne v. Jackson* (3 C. B. 661), is decisive against the sufficiency of this affidavit. The defendant clearly has not brought himself within the provision of this Act.

Byles, Serjt., in support of the rule.—This rule was moved on the general County Courts Act, and, *ex abundante cautela*, under the London Small Debts Act also, that if, on showing cause, it be held not to be under the one Act, it may be within the other. We have brought ourselves within the former Act (9 & 10 Vict. c. 95.) The material sections are ss. 58, 60, and 128. The action is for goods sold and delivered; the sum claimed under 20s. therefore it is not within the exceptions in the 58th section. Next, by section 60, a summons may issue, first, in any district where the defendant dwells or carries on his business at the time when action brought: secondly, in any district within which the defendant shall have dwelt or carried on business within six months of the time of bringing the action, *by leave of the Court*: and thirdly, in any district where the cause of action arose: lastly, as to section 128. The affidavit shows that plaintiff is a wholesale butcher in Newgate-market, in the City of London, and defendant a retail butcher in Portland-town, Marylebone, in the county of Middlesex; deponent swears that the cause of action arose in Middlesex *as he verily believes*. These words refer evidently to jurisdiction; he could not swear positively, because jurisdiction is a question of law. We are within sect. 60. [CRESSWELL, J.—You must, by that section, have leave of the Court for a summons to issue; the clause is in the alternative.] *Primâ facie* we are within jurisdiction, and this rule therefore should be made absolute.

WILDE, C. J.—The affidavit should show that the defendant resided, at the time of action brought, within the jurisdiction of the Court in which the action was brought. Less than this will not support the rule. This is not shown; therefore is this

Rule discharged.

COURT OF QUEEN'S BENCH.

Hilary and Easter Terms, 1848.

FEARON v. NORVAL.

*jurisdiction—Recovery of tenement—Notice to quit.**tenant appeared to a summons under the 122nd section of the Courts Act, and stated some "cause to the contrary" which the judge considered to be insufficient,**the term "show cause" means such cause as, in the opinion of the judge, constitutes a defence, and that is a question within the jurisdiction.**Notice to quit being necessary to determine the tenancy, and contended that this was necessary to give jurisdiction, and in the present case, the notice was bad:**the sufficiency of the notice to quit, and the consequent determination of the tenancy or otherwise was a question wholly for the consideration of the judge, and within his jurisdiction.*

At Michaelmas Term Otter had obtained a rule to show cause why a prohibition should not issue to the judge of a County Court on the ground, first, that he had no jurisdiction to proceed under the 122nd section of the 9 & 10 Vict. c. 95, when the tenant appeared and showed cause against further proceedings. Secondly, that the judge had no jurisdiction to order the tenant to recover a tenement, to which the tenant had no right, and at the hearing he objected generally that the judge had no right to proceed. The 122nd section enacted that "the tenant or occupier shall not thereupon appear at the trial before the judge so appointed, and show cause to the contrary, and shall either deliver possession or refuse to deliver possession," &c., "it shall be the duty of the judge to give proof of the holding and of the determination of the tenancy, with the time or term of the year, &c., and upon proof of the service of the summons or neglect or refusal of the tenant or occupier, as the case may be, it shall be lawful for the judge to issue a warrant, &c.," for possession of the tenement to the landlord. It is remarkable that the statute does not say "good cause" or "sufficient cause to the contrary," but simply "cause," and therefore it is that any cause, however trifling, would suffice to oust the jurisdiction of the County Court. Secondly, the notice to quit was insufficient. It was in the alternative and did not determine the tenancy. But, to give the judge jurisdiction under the 122nd section, the tenancy must be determined, and that can only be done by a notice to quit, and which being necessary to give jurisdiction, this Court will see that the notice to quit was a good

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v.
NORVAL.

LAWRIE
v.
BENDALL.
—
Insolvent under
5 & 6 Vict.
c. 116.

distributed. But to conclude that none others can avail themselves of the statute would lead to very oppressive consequences, who had fallen into difficulties, without fault of his own, a paid his way until he had nothing left wherewith to pay, be beyond the protection of the act.

ERLE, J.—The act says that “any person, not being a or any person being a trader, but owing less than 300*l.* may present a petition.” According to the argument for the plaintiff should be, “any person, provided such person has some property.”
Rule absolute.

COURT OF QUEEN'S BENCH.

June 15, 1848.

WINSOR v. DUNFORD.

County Court—Prohibition—Debt on judgment—Nul tiel record—Evidence.

*A County Court, under the 9 & 10 Vict. c. 95, has jurisdiction to set aside an action on a judgment obtained in a superior court, when the claim thereunder does not exceed 20*l.**

In support of a defence of nul tiel record to an action in a County Court, on a judgment of a superior court, proof of the judgment made by certiorari and mittimus from the Court of Chancery, the case of nul tiel record pleaded in the superior courts, and producing an examined copy of the record in the superior court will not, in support of a motion for a prohibition, enter objection that was not taken, or not properly taken in the superior court below.

Prohibition will not be granted when the entry of the judgment in the County Court shows that a set-off was allowed “by consent.”

WINSOR
v.
DUNFORD.
—
Jurisdiction
over a judgment
in the superior
courts—Proof
of judgment—
Prohibition.

A RULE NISI had been obtained by Naylor for a prohibition to the judge of the Bloomsbury County of Middlesex, to prevent the plaintiff from proceeding to execution in this case. The action was on a judgment in the Court of Queen's Bench, and from the affidavits on which the rule was made appeared, that when the case was called on, the defendant's attorney objected to the jurisdiction of the judge on the following grounds: First, that an action on a judgment in one of the Superior Courts would not lie in a County Court. Secondly, that the judgment could only be proved by the production of the record, for which no machinery existed. Thirdly, that the copy of the judgment

the summons was not a true copy of the record in the Bench. The judge overruled the objections, and pro-
 try the case. An examined copy of the record of the
 was received in evidence without objection, that is,
 appeared to the contrary in the affidavits; and according
 ry of the judgment, which was annexed to the affidavits,
 f set-off was then set up and allowed "by consent." Jurisdiction
 over a judgment
 in the superior
 courts—Proof
 of judgment—
 Prohibition.

ie rule cause was now shown by

—First, debt on a judgment of the superior courts lies in
 Court under the 9 & 10 Vict. c. 95, because it is a plea
 nal action, and not within the exceptive words of the
 n. Before the act, the necessity of averring that the
 tion arose within the jurisdiction created the only diffi-
 n. 1 Salk. 209); but no such averment is necessary
 se the forms which have a statutory authority do not
 and because, except in certain cases, jurisdiction depends
 lence of the defendant. The *Anonymous case*, 2 Salk.
 ot apply. Secondly, the affidavits do not show that the
 ase was not made out by the proper evidence, which
 been a writ of *certiorari* and *mittimus* from the Court
 y (2 Chitt. Arch. 673; *Hewson v. Brown*, 2 Burr. 1034);
 e is no difficulty in the way of a *mittimus* from Chan-
 g to a County Court the return made by the Court of
 nch to a writ of *certiorari* requiring the tenour of a
 ecord to be certified, an inference of a want of jurisdic-
 : ground is not supported. Thirdly, the court cannot
 prohibition, when the effect will be to set aside the
 erdict, and enter a nonsuit on account of the insuffi-
 ie plaintiff's evidence, and so to repeal so much of the
 as final the decision of the judge: (*Ex parte Rayner*,
 16, C. P.; *Winsor v. Dunford*, 1 Cox & Macrae, 90).
 f *Breedon v. Gill* (5 Mod. 269), is distinguishable, be-
 at case the jurisdiction depended on the reception of
 evidence: and in *Shotter v. Friend* (1 Show. 172), the
 ferred to compel an Ecclesiastical Court to decide ac-
 the common law a common law question, whereas in
 e inferior court adjudicates according to common law.
 he defendant does not appear to have objected to the
 f the examined copy: (*Home v. The Earl of Camden*,
 8.) Fifthly, the defendant has acquiesced; for he set
 of set-off, which was allowed, but only "by consent."
 ontra.—The case of *The Tower of London Court* (1 Rol.
 e cases 4 Inst. 251, show that debt on a judgment of
 or court will not lie in the County Court. So also
 alk. 439.) If the County Court has not the means of
 estion according to law, it has not such a jurisdiction
 ill be an obstacle to a writ of prohibition; and *mittimus*
 ourt of Chancery to a County Court does not lie. Per
 B., in *Rance v. Jones*. With regard to the improper
 f evidence, it is admitted that the judge of a County

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DUNFORD.
—
Jurisdiction
over a judgment
in the superior
courts—Proof
of judgment—
Prohibition.

Court must conduct a trial according to law. He failed to do in the present case, and therefore did not get jurisdiction to the judgment of which it is now sought to prohibit the execution. The COURT.—Two objections have been raised to the jurisdiction: the one, that a County Court has not authority to enter an action on a judgment of one of the superior courts: the other, that a County Court has not the means of trying the issue where there is such a judgment or not. The first of these objections is met by the language of the act giving a jurisdiction, which is in respect of this subject-matter abridged by subsequent exceptions, words, and also by the fact that the necessity for averring the cause of action arose within the jurisdiction, which in respect of other inferior courts was and is the difficulty, is not incident to a particular proceeding in a court constituted under the 9 & 10 c. 95. The other objection resolves itself into the question whether there can be a *certiorari* and *mittimus* for the purpose of sending the tenour of a record of a superior court to a County Court from the Court of Chancery? The case in 1 Salk. shows that there may be: and, indeed, the difficulty suggested by Mr. Baron Alderson, in the other case adverted to in the argument, is one of inconvenience only. There does not seem to be any positive difficulty in the way of obtaining the proper evidence, and therefore, even if the supposed inconvenience did not arise, it would have been suggested by very refined apprehensions, we should be bound to hold that the jurisdiction did not fail for want of means to exercise it. It must be recollected that a plea deriding the record will not be resorted to in every case; and therefore unless it is impossible for the County Court to try the question thereby raised, we ought not to defeat the provisions of the section, which gives jurisdiction over debts on a judgment of a superior court as well as over other pleas of personal action. The other points may be disposed of by considering the neglect of the defendant to object at the proper time, and the acquiescence which is manifested by his having set up a claim of set-off.

Rule discharged with costs.

COURT OF QUEEN'S BENCH.

Trinity Term, 1848.

DURANT AND OTHERS v. TOMLIN.

Jurisdiction—Partnership—Certiorari.

Superior Courts of Common Law, having no jurisdiction to try a question of partnership accounts, cannot entertain such a question when brought from the County Court under section 90, even though the defendant undertakes not to raise any objection to the jurisdiction. In the County Court, for the unliquidated balance of a partnership account under the provisions of section 65 of the County Courts Act, the judge of the County Court has an absolute jurisdiction, and the Superior Courts of Common Law have no power to interfere with him or to revise his decisions, however he may trespass beyond his jurisdiction.

Would not a writ of prohibition in such case be issued by the Court of Chancery?

In this case a rule nisi for a certiorari had been obtained to remove into this court a plaint entered in the Barnet County Court, Hertfordshire. The defendant was sued, as a member of a partnership Association, by the other members, for 18*l.* for his share of loss upon the transactions of the association down to a certain period; the 65th section of the 9 & 10 Vict. c. 95, enacted that the jurisdiction of the County Courts under this act extended to the recovery of any demand not exceeding the sum which is the whole or part of the unliquidated balance of a partnership account," &c.

The defendant showed cause, and contended, that as this was a question between partners, the superior courts could not entertain it; if the cause were to be removed, the plaintiffs would fail from a want of jurisdiction, and that therefore the writ ought not to be granted.

Saunders, in support of the rule, argued that it never had been the intention of the Legislature to give to the County Courts jurisdiction in cases involving often such difficult questions of law as those of partnerships, and prevent the superior courts from exercising its supervision; but that if any real question presented itself from the want of jurisdiction in this case, it was removed by the 95th section, which, on the removal of the case, enabled the judge to impose such terms "as to pay costs,—giving security for debt and costs, or such other thing as he shall think fit," the defendant being ready to undertake

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not to raise any objection to the jurisdiction of the court to entertain the cause.

LORD DENMAN.—I do not see how we are to deal with the cause when it is removed—all we could do would be to send it to Chancery to be disposed of. The undertaking of the defendant not to raise any objection would not be sufficient, if the other side does not consent.

Rule discharged.

COURT OF QUEEN'S BENCH.

Thursday, May 11, 1848.

(Before LORD DENMAN, C. J., and PATTESON and
WIGHTMAN, JJ.)

Ex parte CLIPPERTON.

Re GREEN.

County Court—Attorney's Fees—Costs as between attorney and client.

The 91st section of the County Courts Act, 9 & 10 Vict. c. 95, limiting the fee of an attorney for "appearing or acting" in the said court, extends equally to the costs between attorney and client, and also to all matters done by the attorney in relation to the suit previously to the hearing.

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Attorney's fees.

PETERSDORFF showed cause against a rule which had been granted on the motion of *Creasy*, for the Master to review his taxation of an attorney's bill of costs, which contained several items for the prosecution of a suit by an attorney in one of the County Courts established under the 9 & 10 Vict. c. 95. The bill in question contained charges for writing letters, &c., as in an attorney's ordinary bill of costs; but it appearing to the Master that the charges were made in respect of a suit prosecuted in one of the County Courts, he felt bound by the 91st section of the act to allow only the small sum of 15*s.* in respect of all the proceedings in that suit. The 91st section of the act enacted that "no person, not being an attorney admitted to one of Her Majesty's Superior Courts of Record, shall be entitled to have or recover any sum of money for appearing or acting on behalf of any other person in the said court; and no attorney shall be entitled to have or recover therefore any sum of money unless the debt or damage claimed shall be more than 40*s.*, or to have or recover more than 10*s.* for

nd costs, unless the debt or damage claimed shall be more or more than 15s. in any case within the summary jurisdiction of this act." The rule had been obtained on the ground section applied only between party and party, but not attorney and client. He contended, however, that it was to apply in all cases, and was a parliamentary limitation of the attorney. It was said, that there was a special between the client and attorney in this case; but, if so, he ed that it was a contract which could not be enforced, inas as it was a contract in violation of an act of Parliament. r ground on which the rule had been obtained was, that the 10s. and 15s. spoken of in the 91st section only related to remuneration to the attorney for appearing at the trial: but art would see that the words "appearing or acting in of any other person" embraced more than the simple appe at the trial, and in their natural and legal meaning to every thing done by the attorney in connection with

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ny, in support of the rule, contended, in the first place, that tion only applied to the proceedings which took place at the in the court, and not to the preliminary proceedings, or to which took place afterwards. The attorney was not to more than 15s. "therefore;" and by reference to the part of the section, it was evident that the word "there- eant "for appearing or acting on behalf of any other per- he said court." He was to recover 15s. "for appearing or for his client. The word "acting," as well as the word ring," had relation solely to what took place at the trial. as manifest from the earlier portions of the section, which, ntitling an attorney to appear for another person at the ; went on to make his right to argue and plead for such erson conditional on the judge's permission. "Appearing," re, and "acting," might both be treated as limited to the id yet each word might have a distinct and rational mean- "Appearing" meant appearing in court so as to prevent non- judgment by default; and "acting," meant acting as an e. To these functions alone the limited charge of the 15s. was ble. When a man sued in the County Court, it was as ry for him to adopt the proper form of action, to make all cotors plaintiffs, &c., as it was in an action in the Superior Professional advice on these points was generally necessary; h advice, if given, ought to be fairly paid for. There was ; in the act that necessarily forbade such payment; nor be construed so to preclude an attorney from charging for ting-up of evidence, which was a distinct proceeding, and en of more importance in suits prosecuted in County Courts n those which are prosecuted in the Superior Courts, inas as in the former the parties themselves might be examined neases, which rendered it necessary to be prepared to answer ssertions which an adversary might choose to make. The

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88th section enacted, "that all the costs of any action or proceeding, not herein otherwise provided for, shall be paid by or apportioned between the parties in such manner as the judge shall think fit, &c.," and that section seemed to show that costs might be awarded for proceedings previous to and after the hearing. But even if the court were to hold that, as between party and party, 15s. was the maximum allowed for all costs, there was no reason to suppose that the section referred to costs as between attorney and client at all. [PATTESON, J.—Then the expression, "and no attorney shall be entitled to recover, &c.," was inaccurate, because in the case between party and party it is not the attorney but the party who recovers.] The construction now submitted to the court was much confirmed by the last words of the section, which made the right to any costs at all depend upon the order of the judge at the trial. This was intelligible as between party and party, but absurd if applied to attorney and client. It was impossible for the judge of the County Court to know all the motives which might induce a party to employ an attorney. It was most important to the public that they should have that option. A party might be incompetent to act as his own advocate, and even if competent his engagements in business might be such as to render it impossible for him to attend the court, where he would have to wait nearly a whole day before his cause came on. He submitted that no gentleman of skill and integrity could be expected to undertake cases in those courts if the amount to be recovered for the attention devoted to the entire proceedings in the case were to be limited to the small sum of 15s. It might be proper that the Master should require to be satisfied that the attorney had given notice to his client that such extra costs could not be recovered from the opposite party, as was done in the case of writs of trial before the sheriff; but to hold that more than 15s. could not in any case be recovered would, he submitted, be a limitation most injurious to the public, and such as was not contemplated by the act. At all events, where there had been a special agreement between the attorney and client, the attorney ought to be allowed to recover his costs. *Cur. adv. vult.*

Wednesday, July 12.—The Court this day delivered

JUDGMENT.

PATTESON, J.—This was an application to review the Master's taxation of a bill of costs against his own client for business done in the County Court by an attorney. The Master had allowed only 10s. according to the provisions of the statute 9 & 10 Vict. c. 95, s. 91. Two objections were made; first, that the clause does not apply to a bill between attorney and client, but only between party and party; and, secondly, that it does not apply to any business preliminary to the hearing of the cause, but only with a view to a suit in the County Court. The words of the section are pretty clear,—that "no attorney shall be entitled to have or recover therefore;" that is, for appearing or acting

on behalf of any other person in the County Court more than the sum there specified, as allowed by the Master. We are of opinion that the Legislature did not intend to make any distinction between an attorney's right to recover from the opposite party and from his own client. We think the costs intended to be allowed between party and party, in regard to attorneys, are all such costs as such attorneys are entitled to receive from their clients. The latter part of the section which requires the order of a judge for the allowance of such costs as between party and party was meant as a further check against the unnecessary employment of attorneys, but does not limit or control the preceding part of the clause. We are further of opinion that the words "acting for any other person in the County Court," include everything that is done by an attorney in regard to a suit in the court, whether before, or at, or after, the hearing. The 88th section was referred to, but that throws no further light upon the subject; and, therefore, the rule must be discharged.

Ex parte
CLIFFERTON.
Re GIBBEN.
—
Attorney's fees.

COURT OF COMMON PLEAS.

June 15, 1848.

WATERS v. HANDLEY.

Jurisdiction—Prohibition—Bill of exchange—Practice.

The County Court has jurisdiction over bills of exchange.

Where it appeared that the defendant had never been summoned, and the judge of the County Court had, nevertheless, proceeded to adjudicate in the matter, this court, considering the determination whether process was regular or not to lie properly in the judge of the County Court, will not interfere by prohibition.

Neither will the court interfere by prohibition, because the summons, having been obtained by leave of the court for the district in which the defendant dwelt or carried on his business within six months next before action brought, or in which the cause of action arose, did not, on the face of it, show that it had been obtained by leave of such court.

NAYLOR moved for a rule to show cause why a writ of prohibition should not issue to the judge of the Clerkenwell County Court of Middlesex, on the following grounds:—First, this is an action on a bill of exchange. It is submitted, on the authority of the case *Meeten v. Vickers*, 11 Law T. 104, that the County Court has no jurisdiction over actions on bills of exchange. There Cresswell, J. is reported to have said, that it was, at least, doubtful whether the County Court had jurisdiction in such cases. [CRESSWELL, J.—What I said had reference to the 128th section of the act. Those courts clearly have jurisdiction where the defendant dwells in the district within which the cause of action arose.] Secondly, the defendant was never summoned; and, consequently, the judge acted without jurisdiction when he heard and determined the case,

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before it had been proved that the defendant had been summoned. The affidavit on which this motion is grounded shows that a summons had been left at a certain house, but that house was not the house of defendant, neither had the summons ever come to his knowledge. Thirdly, in the affidavit, the defendant swore that, *at the time of the entry of the plaint*, he, the defendant, did not reside in the Clerkenwell district, nor had he resided there within the previous six months. There was, therefore, clearly no jurisdiction in the County Court to try this action. [MAULE, J.—Is not the issue of the summons the commencement of the action?] It is submitted that it is not. The 59th section says, that the plaintiff shall apply to the clerk, who shall enter a plaint, and “thereupon” a summons shall issue. If the summons be considered the commencement of the action, then the word “thereupon” shows that the entry of the plaint had reference to the same time; so that when the affidavit stated that the defendant “had not resided in the district at the time of the entry of the plaint,” it was equivalent to saying that the defendant had not resided there at the time of the issuing of the summons. Fourthly, the summons does not state that the leave of the court within which the defendant dwelt or carried on business within six months next before action brought, or of that wherein the cause of action arose, had been granted to issue it. It should have shown this. [CRESSWELL, J.—How can this involve the jurisdiction of the court?] It is conceded that this would rather be a ground for a prohibition *pro defectu triationis*, than for a prohibition *pro defectu jurisdictionis*. The writ goes for either, as there are abundant cases to show. All process must show the jurisdiction of the court whence it issues, and unless the “leave of the court” appeared on the face of the summons when it issued, in the two instances where by the 60th section leave is made necessary, a defendant would not know whether it was imperative on him to attend to the summons or not if he resided out of the district. Except this appears, the case does not properly come before the court, and, consequently, there was a defect in the trial. On these four grounds it is submitted there should be a rule in this case.

COLTMAN, J.—There is no doubt in the breast of the court that an action lies in the County Court on bills of exchange under 20*l.*, there will, therefore, be no rule on the first ground. As to the second point, we think it was for the judge to determine whether the process was properly issued or not. On the third ground we think there should be a rule, as the defendant swore that he did not reside in the district at the time of the entry of the plaint, and had not for six months before. On the fourth ground we refuse a rule, as this form of summons was framed by the judges, and we think it must be taken to be good in special as well as in general cases.

WILDE, C. J. was absent from indisposition.

MAULE, J. and CRESSWELL, J. concurred.

Rule refused on the first, second, and fourth grounds; rule nisi on the third ground.

COURT OF EXCHEQUER.

July 13, 1848.

BUTLER v. CONEY.

Jurisdiction—Bill of exchange—Suggestion—Practice.

The court will not, on a motion for a suggestion, decide whether or not a bill of exchange is within the jurisdiction of the County Court.

Query, whether a bill of exchange is a cause of action within the jurisdiction of the County Court, and whether the superior courts have a concurrent jurisdiction?

On a motion for a suggestion, it is not necessary to negative the fact that plaintiff is an attorney, that is matter that properly should come from the other side.

NEEDHAM showed cause against a rule calling on the plaintiff to show cause why the plaintiff should not bring in the *postea* and file the plea roll, so that the defendant might enter a suggestion to deprive the plaintiff of costs, under the County Courts Act. The rule was obtained on an affidavit, which it is contended is insufficient. The 128th and 129th sections of the 9 & 10 Vict. c. 95, are the sections relied on. The 128th section enacts that all actions which, before the passing of the act, might have been brought in the superior courts, where the plaintiff dwells more than twenty miles from the defendant, or where the cause of action did not arise wholly, or in some material point, within the jurisdiction of the court within which the defendant dwells, or where any officer of the court shall be a party, such action may be brought in the superior court, at the election of the party suing. The 129th section enacts, that if any other action shall be brought in the superior court for any cause other than those lastly specified, for which a plaint might have been entered in the County Court, if he recover less than 20*l.* he is deprived of costs. By the 128th section, he must show one or other of these two facts, that the plaintiff and defendant reside within twenty miles of each other, or he must show that the cause of action arose within the jurisdiction of the County Court, and the way in which he seeks to show that the cause of action arose within the jurisdiction of the court is this; he states that the action is brought in the present case for a cause for which a plaint might have been entered in the County Court, and that the said cause of action arose in a material point within the jurisdiction of the County Court. He does not state that the whole cause of

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action, or all the causes of action, arose within the jurisdiction; it is consistent with this affidavit that the action may have been brought for five different causes, and four of them may not have been within the jurisdiction of the court; and the fact is, that one of the causes of action arose upon a bill of exchange, about which there is considerable doubt whether it can be said to have any locality, so as to be within the jurisdiction of a County Court. Secondly, the affidavit does not negative the fact that the plaintiff was an attorney, in which case he would not be bound to sue in the County Court: (*Jones v. Brown*, 1 Cox & Macrae, 102.) [POLLOCK, C. B.—It is sufficient if it appears to be within the scope of the act. If there is any particular matter which will take the case out of the statute, it should come from the other side. If he comes within the words of the section it is quite sufficient.] Then as to the point upon the bill of exchange—the action was brought as well upon a bill of exchange as for goods sold and delivered. The cause of action upon a bill of exchange cannot be said to arise anywhere. The cases decided as to changing the venue clearly show that a bill of exchange has no locality. [POLLOCK, C. B.—I think you can hardly expect that the court will decide a point of this description on a motion; the other side ought to have an opportunity of arguing it, so that if they please they can take the opinion of a court of error.] It is true that in a case (*Nind v. Rhodes*, 1 Cox & Macrae, 155), Coleridge, J. seems to have held that bills of exchange are within the act, but the point is still pending before the full Court of Common Pleas. [ALDERSON, B.—It is not that it does not arise, but that it does not arise wholly or in some material point; therefore, if it arose in some material point, it will do.] The action is upon a bill of exchange accepted by the defendant.

ALDERSON, B.—Then, if it were accepted within the jurisdiction, would not that be a material point? But I have no doubt myself about its being within the jurisdiction of the County Court. The only question is, whether the superior courts have not a concurrent jurisdiction.

Manisty, contra.

POLLOCK, C. B.—I do not think it necessary to decide, on this argument, whether the doubt suggested about the bill of exchange is well founded or not. The cause is not before us sufficiently to do so. Mr. *Manisty* applies for leave to enter a suggestion; which, substantially, he has a right to do, unless he is successfully opposed as to the jurisdiction of the court. It is true that we are called upon to decide matter of law whenever it arises; but when an application is made to the court and, if decided one way, is open to investigation, and when decided the other way the decision is conclusive, I think we ought to decide in that way which will allow of our decision being reviewed. If there be a shade of doubt on the subject, I think we ought not to deprive Mr. *Manisty* of his right to have our decision investigated.

ROLFE, B.—I think it is the most inconvenient course to have the matter discussed now. It is a legal right given by the statute that he should have a suggestion entered on the record; and if it be his legal right, we are bound to put him in such a situation as will insure him this right; and when it is done, then will be the proper time to discuss whether he is right or not. The rule must be made absolute.

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Rule absolute.

JUDGES' CHAMBERS.

(Before BARON PLATT.)

RUSSELL v. JONES.

Counsel—Privilege from arrest.

A barrister bonâ fide attending a County Court is privileged from arrest.

IN this case an application was made before Mr. Baron Platt, at chambers, by *Philp*, an attorney acting on the part of the defendant, a barrister, to show cause why the defendant should not be discharged out of custody of the sheriffs of London, in this and several other actions upon which the defendant had been detained, on the ground that the defendant, at the time of the arrest, was protected by his privilege as a barrister. It appeared that the defendant, having received a brief to appear as counsel before Mr. Clive, the judge of the Southwark County Court, had been in attendance there accordingly, and on his return from the court to his residence, as he was passing through the city towards Holborn-hill, he was arrested by one of the officers of the sheriffs of London, upon a writ of *ca. sa.* for 45*l.*, issued at the suit of the plaintiff, and conveyed to Whitecross prison, when, on searching the office, it was found that there were several other detainers against him; and, although the defendant claimed his privilege, the Secondaries refused his discharge. On the part of the defendant it was contended that, inasmuch as the Southwark County Court was established by the 9 & 10 Vict. c. 95, and was a court of record, and so recognized by the courts at

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Westminster, a barrister practising and appearing in those courts at the time of the sitting of the court, under the provisions of the act, was entitled to the same privileges, and protected from arrest in going to and returning from such court, in the same manner as a barrister was privileged from arrest while attending in either of the superior courts at Westminster, during the sittings of those courts.

Eady, for the plaintiff, contended, contra, that the defendant was not privileged, and that the County Court was not a court to which the meaning of the privilege was intended to apply, and that it did not extend to any case unless it was shown that the defendant was in actual attendance at Westminster: (*Newton v. Constable*, 2 Q. B. Rep. 166.)

PLATT, B. said, the only doubt he had on his mind was, whether the defendant was entitled to be discharged upon the other detainers. A case of a similar nature had occurred before Patteson, J., and after consulting the judges, they were of opinion that he was. There could be no doubt that the County Court was a court of record, and that a barrister *bonâ fide* attending such court was privileged from arrest; and therefore, in this case the defendant was entitled to be discharged as to all the actions upon which he was detained. The learned judge made the order accordingly, the defendant not to bring any action against the sheriff, and without costs.

COURT OF QUEEN'S BENCH.

June 28, 1848.

GREGORY AND ANOTHER v. CHIDSEY.

Cause of action—Splitting demands.

*being indebted to plaintiffs in a sum exceeding 20l. they
plaint in the County Court for, and recovered 19l. 9s. 6d.
ntiffs afterwards sued for the balance in the superior court,
ration containing counts for money lent, goods sold, and
tated. Defendant pleaded to the whole declaration the for-
ty Court judgment, and that the plaintiffs had cause of action
19l. 9s. 6d. and all the money in the declaration for which a
uld, if the whole had been under 20l., have been entered at the
, entering it for the 19l. 9s. 6d. :*

*it should have averred the causes of action in the County
be the same as those for which the action was brought in the
court ; and that " cause of action " in the 63rd section of
O Vict. c. 95, does not include all that may be inserted in one
is count.*

*ther, when the plaintiff relinquishes the excess over 20l., to
m to sue in the County Court, it should not be so entered upon
sent of the County Court accordingly, that the excess is aban-
nd that the judgment is in full discharge of all demands ?*

*as an action of debt brought by the plaintiffs, who were
eepers, against the defendant, a contractor on the Bristol
r railway, and the declaration contained three counts,
ods sold and delivered, another for money lent, and a
an account stated. Defendant pleaded, 1st, never in-
nd, payment ; and 3rd, a special plea under the 9 & 10
5, s. 63. The plea alleged the passing of that act,
after specifically setting out all that was required to
or the purpose of holding a County Court under it
for the district of Gloucestershire, it proceeded to aver
wards, and whilst the defendant was indebted to the
n the sum of 19l. 9s. 6d., and also all the moneys in the
mentioned, and before the commencement of this suit,
&c. and during all the time aforesaid, the plaintiffs had
ction against the defendant for more than 20l., to wit,
l the sum of 19l. 9s. 6d. as for all the moneys in the
mentioned, for which a plaint then, to wit, on, &c.
could have been entered under the said act, at the said
len, &c. if the said demand and cause of action so due
defendant to the plaintiffs had not amounted to or been*

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more than 20*l*. The plea then proceeded to state that the plaintiffs had brought a suit in the said County Court, held at for the 19*l*. 9*s*. 6*d*. setting out the proceedings in detail court to the judgment, and averring that judgment was rendered in that court for the sum of 19*l*. 9*s*. 6*d*. and entered accordingly and that the plaintiffs did thereby under and by virtue of the judgment, give up and exonerate the defendant from all the claims in the declaration; it then alleged the identity of the parties in the usual way, that the plaintiffs below were the same as the plaintiffs in the declaration, and the defendant below as the defendant there. In the last plea there was a special demurrer, on the ground that it did not show with sufficient certainty that the sum recovered in the County Court was in respect of any part of the debts claimed in the declaration; and, for anything alleged to the contrary, several debts and causes of action in the declaration were entirely distinct debts and causes of action from the causes of action for which the judgment has been recovered in the County Court; and, if it did so appear, it was not direct but only as matter of inference.

Dowdeswell, in support of the demurrer.—This plea is upon the 63rd section of the County Court Act as to splitting demands. He then referred to the plea, and contended that Mr. Justice Coleridge had already decided the point in a similar clause in the Brighton Court Act, in a case called *Ellis* (1 D. & L. 63; 1 Law T. 261), where there was a claim for goods sold, for rent, and for a horse sold, and the plaintiff having recovered for the price of the horse only in the County Court, was held not to be precluded from suing in this Court for the remainder.

F. Bailey, who appeared in support of the plea.—In *Ellis*, the learned judge really decided no such thing. The objection to Mr. Justice Coleridge was to stay all further proceedings in the action, which he declined to do, stating that if a defence was available it must be pleaded.

Dowdeswell.—*Grimbley v. Ackroyd*, (17 L. J. 157, Ex.) is to no effect. Here there are three counts and three distinct causes of action, and it is in no way shown that they are, or that any one of them is the same as that for which the judgment was recovered in the County Court. [PATTESON, J.—Why did not the defendant allege the identity of the cause of action, in the same way as the identity of the parties is shown upon this plea?] Because the sums of money due are different debts, and distinct causes of action; my friend could not so aver it, and it was preferred in this plea for that purpose, as it could not have been done in any other way. [COLERIDGE, J.—The 63rd section says, “that no person shall be lawful to divide any cause of action, and any person who shall do so shall be liable to pay costs, and any person having cause of action for more than 20*l*. for which a plaintiff may enter a judgment under this act, if not for more than 20*l*. may abandon the judgment, and thereupon the plaintiff shall, in proving his claim, recover to an amount not exceeding 20*l*. and the judgment shall be entered accordingly.”] The plea is not good.

upon such plaint shall be in full discharge of all demands in
 of such verification." Then what do you say to this part
 plea, which states that the plaintiffs had cause of action—
 singular number—for as well the 19*l.* 9*s.* 6*d.* as all the
 in the declaration for which a plaint could have been
 in the County Court?] The answer was given by Mr.
 Patteson, that it should appear that the cause or causes
 were the same.

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 Cause of action
 —Splitting de-
 mands.

ry.—The account stated would include the two other counts
 ds sold and money lent, and all under the new rules *might*
 ded in one *indebitatus* count. It has never yet been held
 whatever might be included in one *indebitatus* count is not to
 strued under this clause as a cause of one action. He
 d to *Wickham v. Lee* (11 Law T. 240.)

RESON, J.—It certainly does not mean all that might be
 d in a general *indebitatus* count, for that may contain
 it causes of action altogether very distinct from one

D DENMAN.—Had you not better see if the facts will not
 ou to amend.

RESON, J.—In doing so, observe that at the latter part
 63rd section it is said, "the judgment of the court upon
 plaint shall be in full discharge of all demands in respect
 i cause of action, and entry of the judgment shall be
 accordingly."

Leave to amend accordingly.

COURT OF COMMON PLEAS.

Trinity Term, 1848.

PETERSON AND ANOTHER v. DAVIS.

*Suggestion to deprive plaintiff of costs—Affidavit—Jurisdiction judge at chambers—Time for application.**Final judgment on a verdict for less than 20l. was signed on the 10th of May. . A summons at chambers was taken out to show cause the defendant should not enter a suggestion to deprive the plaintiff of costs and was dismissed for insufficiency of the affidavit. Other summonses were afterwards taken out, and also dismissed on the ground that the matter had been previously disposed of by another judge. Then an application was made to the court on the first four days of term.**Held that the application was in time, and was not precluded by previous application at chambers.**The affidavit in support of the application for leave to enter a suggestion, stated that the defendant, at the time of bringing the action, carried on his business at No. 133, Fenchurch-street, in the city of London, and dwelt and carried on his business in the city of London aforesaid, and that the plaintiff, at the commencement of the suit, did not dwell more than twenty miles from the defendant, but, on the contrary, did dwell within the distance of one mile from the defendant.**Held, to be insufficient, inasmuch as it did not show that the action was not one in which there is a concurrent jurisdiction with the superior courts, under sect. 112 of the City of London Act (10 & 11 Vict. c. 11) and which is there given in cases where the plaintiff dwells more than twenty miles from the defendant.**Whether a suggestion may be entered where the plaintiff does not dwell more than twenty miles from the defendant's place of business, although he dwells more than twenty miles from defendant's dwelling, quære!*

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LUSH had obtained a rule calling on the plaintiff to state the cause why so much of the final judgment signed in this case as relates to costs should not be set aside, or why the plaintiff should not be restrained from taking out execution on this case for more than the amount of debt recovered on the trial of the action; or why, upon payment by the said defendant to the plaintiffs, or their attorney, of their costs of the said judgment, the said judgment should not be set aside, and the said plaintiff should not forthwith carry in the record in this cause, and the defendant be at liberty to enter a suggestion thereon to deprive the said plaintiffs of their costs of this action, the verdict in the said plaintiffs, on the said trial, being for a sum not more than 20l., and for the recovery of which a plaintiff might have been

in the Sheriff's Court of the city of London, pursuant to 10 & 11 Vict. c. lxxi. It appeared that the action was commenced on the 14th of March, 1848, and that it was tried on the 15th of May, and a verdict for 12*l.* 3*s.* 6*d.* returned for the defendant. Immediately after the trial, on the same day, the defendant took out a suggestion—
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the suggestion should not be entered herein to deprive the plaintiffs of their costs in this cause, the verdict being under £12*l.* 3*s.* 6*d.*, or why all proceedings under the said verdict should not be stayed till the first four days of the premium, to enable defendant to apply to the court to enter a rule. On the following day, the summons was attended by the parties before Coltman, J. when the said plaintiffs, attended by counsel objected, that the said summons was defective, and that the application ought to be made to this court, and that the affidavit was not sufficient; and that it did not appear that the plaintiffs, nor either of them, were, or was not, an officer of the said court, for the more easy recovery of debts and demands within the city of London and the suburbs thereof. The summons was dismissed without costs, upon the affidavit being amended, and a similar application made for a writ of summons; but the judge refused to hear the same application again, and dismissed the summons, as also another summons which had been taken out to show cause why, on payment of the amount of the said verdict, all proceedings in the said action should not be stayed, and for the like stay of proceedings, the defendant to move the court to enter a suggestion. The defendant's attorney, immediately after the said summonses were dismissed, proceeded to tax his costs of the said action, and ordered to proceed to execution. Whereupon, and before said order, the deponent personally served the said plaintiffs with a writ of summons, on the 19th day of May instant, with a notice of the defendant's intention to apply to the court for this rule.

The judgment was signed on the 17th of May. The affidavit in support of the rule also stated that "the defendant is a merchant, carrying on his business at No. 133, Fenchurch-street, in the city of London, where the said writ of summons was directed and was served, as this deponent has been sworn and believes; and this deponent further saith, that the defendant before, and at the time of, the issuing of the writ or summons, dwelt and carried on his business in the city of London aforesaid, of which the said plaintiffs were well acquainted; and that in pursuance, and by virtue of the 10 & 11 Vict. c. lxxi. intituled 'An Act for the more easy Recovery of Debts and Demands within the City of London and the suburbs thereof,' a court, before the issuing of the said writ of summons, was and is established in and for the city of London and the suburbs thereof, to which court, having jurisdiction in and for the city of London and the liberties thereof, the said defendant ought to be summoned by writ, and that the plaintiffs ought

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to have entered their plaint for the recovery of the said sum 12*l.* 3*s.* 6*d.*, both parties being, at the time the said action brought in this court, resident within the jurisdiction of the court, established within the said city of London and the liberties thereof, for the more easy recovery of small debts and demands pursuant to the said act of Parliament. And this deponent further saith that the said plaintiffs, at the time of the commencement of this suit, did not dwell more than twenty miles from said defendant, but, on the contrary, did dwell within the distance of one mile from the said defendant; and this deponent saith, that the said plaintiffs, at the time of the commencement of this suit, dwelt and carried on their business at No. 33, Poultry, in the city of London and the liberties thereof, and not more than two miles from the said defendant: and this deponent further saith that the said defendant also dwelt and carried on his business as merchant within the said city of London and the liberties thereof for upwards of six calendar months then next before the time of the commencement of this action, and that he has continued to carry on his business there." There was an affidavit produced by the plaintiff on showing cause against the rule, the effect of which is stated in the argument.

Peterson now showed cause.—First, this application having been already heard and determined by a judge at chambers, the defendant cannot come to the court with amended affidavits to make an application in substance the same. (*Reg. v. Great Western Railway Company*, 5 Q. B. 597; *Rex v. Sheriff of Devon*, 2 A. & E. 296; *Thompson v. Becke*, 4 Q. B. 759.) Secondly, a judge at chambers has jurisdiction to entertain this application. The 10 & 11 Vict. c. lxxi. does not contain any provision requiring that this application should be made to the court, and a judge at chambers may, therefore, by his common law jurisdiction, make such an order as this. (*R. v. Almon*, Wilmot's Notes, 264; *Lush Practice*, 799.) It is there laid down that there is nothing in the constitution of the court which forbids the business of it being done by one judge. But where a jurisdiction is created and conferred on the court, by statute, a judge at chambers cannot act although the court can act when the statute gives the jurisdiction to a judge. Thirdly, the application for this rule was made too late. The trial was on the 12th of May, and the rule was applied for till the 30th of May. Fourthly, the affidavit in support of the rule does not show where the defendant dwelt. It states, no doubt, that both parties dwelt within the jurisdiction, but not the place where the defendant dwelt. The affidavit, in answer, states that the house in which the defendant is stated to carry on his business is divided into offices, and so let out, so that it is not used for dwelling; and that inquiry was made of the defendant there, when an answer was given that he had not come to town yet, the fair inference being that the defendant did not dwell in the city of London. If so, the case is not within the 112th section, and to bring the case within section 113, the

endant must in his affidavit negative all in the 112th section that gives a concurrent jurisdiction to the superior courts, (a) which here has not been done. The words of the affidavit do not show that defendant does not *dwelt* more than twenty miles from plaintiff, only that is not that distance from him, and is connected with his moving walked to within a short distance from his house.

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Lush, contra.—It has never been the practice to apply to a judge in chambers to enter a suggestion, but always to move *the court*; although the Middlesex Court of Requests Act does not expressly require that the application should be made to *the court*. *Smith v. Temperley* (16 M. & W. 273), shows that the time for entering the suggestion is within the first four days of the ensuing term.

MAULE, J.—But you have chosen to make your application to a judge in chambers, and so have given him jurisdiction.

Lush.—But even if he had jurisdiction the defendant may afterwards apply to the court. All the cases cited were those of a second application to *the court*. No rule forbids a party to apply to the court after an application to a judge in chambers. In *Pike v. Davis* (8 M. & W. 546), Lord Abinger said, “a party clearly has a right to move to set aside a judge’s order, if made; and if he refuse to make one, what other remedy is there except an application to the court? Nor is there any rule which says that a party shall not have the power of laying additional facts before the court by affidavit.” (See also *Baddley v. Oliver*, 1 C. & M. 219; *Bond v. Bailey*, 2 C. M. & R. 246; *Heale v. Erle*, 2 M. & W. 383; *Johnson v. Beale*, 5 M. & W. 276.) Then, as to the statement of defendant’s dwelling, in the affidavit; the statute does not require that the twenty miles should be from the place where the defendant dwells. The 40th section enacts, that the “summons may be served, provided the defendant, or one of the defendants, shall dwell, carry on his business, within the city of London or the liberties thereof at the time of the action brought; or provided the defendant, or one of the defendants, shall have dwelt or carried on business therein at some time within six calendar months next before the time of the action brought, or if the cause of action arose therein.” And the 112th, read in connexion with this, will give the meaning of the words “from the defendant,” to be “from the place where defendant dwells or carries on his business;” and therefore it will suffice if the affidavit show that the plaintiff did not dwell more than twenty miles from the defendant’s place of business. The new court is a substitute, or rather an extension, of the old City Court; and *Croft v. Pitman*, 5 Taunt. 649, shows that the old statute was applicable to a person who occupied half a counting-house in the city.

(a) The 112th section is as follows:—“And be it enacted, that all actions and proceedings brought before the passing of this act might have been brought in any of Her Majesty’s Superior Courts of Record, where the plaintiff dwells more than twenty miles from the defendant, or where any officer of the court holden under the provisions of this act shall be a party, except the subject-matter of any claim to any goods and chattels taken in execution of the process of the court, or the proceeds or value thereof, may be brought and determined in any such superior court, at the election of the party suing or proceeding, as if this act had not been passed.”

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Jurisdiction

CRESSWELL, J.—The 112th section of the new statute clearly refers to the defendant's dwelling.

Lush.—Lastly, since *Watson v. Quilter*, 11 M. & W. 760, which decided that a suggestion on the record is traversable, the defendant is without remedy if the rule be not made absolute; but if made absolute plaintiffs have still the liberty of trying the truth of the suggestion.

COLTMAN, J.—May not the plaintiffs also demur to the sufficiency of the facts suggested?

Lush.—It is apprehended they may.

WILDE, C. J.—Two questions have arisen and been discussed in this case. First, whether the defendant is precluded from making this application to the court by reason of the prior applications to a judge at chambers. It appears that this motion was once heard before a judge at chambers, and disposed of on the merits, viz., that the affidavit in support of the application was not sufficient to entitle the defendant to deprive the plaintiff of his costs by entering a suggestion. The last two summonses were not disposed of on the merits, but on the ground that the application had been previously disposed of by another judge. The question now is, whether that application may be reviewed by way of appeal, or whether another application to the court may be made on other affidavits. The court is of opinion that the defendant is not precluded from making this application by what has occurred. Considering the vast quantity of business that comes before a judge at chambers, and the difficulty that the judge has in dealing with it, it would be very inconvenient if the parties were finally concluded by his decision. The court is of opinion, that it is competent to either party to make an application to the court by way of review of the order of a judge at chambers, or on a different state of facts. As to the second point, the defendant now asks the court to give him leave to enter a suggestion on record, that the plaintiffs, at the time of the commencement of this suit, did not dwell more than twenty miles from the said defendant. In order to induce the court to grant this application, the defendant should lay reasonable and proper grounds before the court, and the grounds are not sufficient unless he furnishes proper information from which the fact to be suggested on the record may appear. The affidavit states the place where the defendant carries on his business to be in the city of London, and also that the defendant dwells in the city of London, and that the plaintiffs, at the time of the commencement of this suit, did not dwell more than twenty miles from the said defendant; but, on the contrary, did dwell within the distance of one mile from the said defendant; but the place where the defendant dwells is not more particularly stated. Suppose the affidavit stated that the party dwelt within ten or twelve miles of Yorkshire, it could not be contended that such statement would be at all sufficient; and I apprehend that it would not be less difficult to find a man of whom you knew nothing but his name, if said to be in the city of London, than it would be if said to be within ten

...the plaintiff, at the time of the commencement of this
did not dwell more than twenty miles from the place where
the defendant carried on his business. The rule will therefore
be made to set aside the judgment, on payment of the costs of
the judgment, as prayed by the rule, and to enter a suggestion in
the same mentioned, but as final judgment was signed on the 17th
, and this rule was obtained within the first four days of the
month without the costs of this application.

Rule accordingly.

BAIL COURT.

May 31, 1848.

(Before Mr. JUSTICE WIGHTMAN.)

CROWE v. HUNT.

Prohibition.

The defendant was sued in the County Court under sect. 122 of the 9 & 10 Vict. c. 95, to recover possession of some premises. On the trial, the judge nonsuited the plaintiff, with leave to move at the next court to set aside the nonsuit, no leave (as it was sworn) being reserved for a verdict for the plaintiff. In due time, before the next court, the defendant received a notice through the post that the plaintiff would apply to set aside the nonsuit and enter a verdict for the plaintiff. The defendant did not attend in pursuance of the notice, he was afterwards served with a notice that the court had set aside the nonsuit, and directed a verdict to be entered for the plaintiff.
An application for a prohibition to restrain the judge from pro-

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—
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at the trial, on the 25th of April last, the plaintiff was nonsuited, but leave was reserved to move at the next court to set aside the nonsuit; but (as it was sworn) no leave was given upon such motion to move to enter a verdict for the defendant. On the 12th of May instant, the defendant received a notice by the post that the plaintiff would, at the next court-day, on the 22nd of May, apply to set aside the proceedings in the nature of a nonsuit, and pray for judgment of the court for the plaintiff. The defendant did not attend on that day, and subsequently he was served with notice, under the seal of the court, that the nonsuit had been set aside, and that it was adjudged that the plaintiff should recover against the defendant possession of the said messuage and premises, together with certain costs. The 21st rule provides that "no application for a new trial, or to set aside any proceedings shall be made subsequently to the court at which such trial or other proceedings shall have been had, unless the party making such application shall have given a written notice thereof to the clerk of the court, at his office, and to the other party, by serving the same personally, or leaving the same at his usual place of abode or business seven clear days before the time of holding the court at which such application shall be made."

Dasent now moved for a rule for a prohibition to restrain the judge of the County Court from carrying into effect his judgment in this case, and he did so on the ground, that as no leave had been reserved to enter a verdict for the plaintiff, he had no jurisdiction to direct it to be entered.

WIGHTMAN, J.—Why did not the defendant attend the court on the application, and object?

Dasent.—The notice of the intended application was badly served; it came through the post.

WIGHTMAN, J.—The defendant admits that he received it in due time, and the rule does not require it to be served by any particular party. The defendant should have attended and have stated his objection; he cannot be permitted to lie by, and then come for a prohibition.

Rule refused.

BAIL COURT.

Hilary Term, 1848.

(Before WIGHTMAN, J.)

NIND v. RHODES.

Suggestion—Form of rule.

action has been brought in the superior courts for a debt due in the County Court, the rule should be in this form, "to show why the judgment should not be entered for the amount of debt, or why a suggestion should not be entered to deprive the plaintiff of costs."

NOW moved for a rule calling upon the plaintiff to show why he should not carry in the roll in this case, and suggestion should not be entered to deprive the plaintiff of costs.

This was an action brought against the defendant, as a bill of exchange given for the sum of 12*l.* for which a verdict was obtained. The defendant resided at Clerk-which place the bill was addressed to him, and for which there is a County Court, the plaintiff himself residing 10 miles of that place; and it was submitted that the defendant had been sued for in the before-mentioned County Court, the cause of action being within the 58th section of the Act, c. 95, and the 129th section depriving the plaintiff of costs under such circumstances.

WIGHTMAN, J.—The act says nothing about entering a suggestion, and there is some difficulty in determining the proper course.

—By analogy to motions under the Courts of Requests, a suggestion would be the proper course. The defendant would claim a right to have the facts placed upon record.

WIGHTMAN, J.—The rule might be in this form—"to show why the judgment should not be entered for the amount of debt only, or why a suggestion should not be entered to deprive the plaintiff of costs." As this is the first case that has arisen on this subject, the rule can be moulded into its proper argument.

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Suggestion—
Practice.

Rule nisi.

COURT OF EXCHEQUER.

Trinity Term, 1848.

JACOBS v. HYDE.

PLATEL v. BEVILL.

*Insolvent—5 & 6 Vict. c. 116, and 7 & 8 Vict. c. 96—Pleading.**By the 7 & 8 Vict. c. 96, all the estate, present and future, of an insolvent debtor, coming to him before final order, is vested in his assignee, and property subsequently acquired can only be dealt with under the provisions of 5 & 6 Vict. c. 116, s. 9.**The effect of the 7 & 8 Vict. c. 96, is to give to the final order for protection the same effect as a final order under 5 & 6 Vict. c. 116, as to protect the after-acquired property, as well as the person of the insolvent, and may be pleaded in bar as such, under the 10th section.*

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—
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THIS was an action by the indorsee against the acceptor of a bill of exchange; to which it was pleaded, that before the commencement of the suit a petition for protection from process was, according to the form of the statute, &c., presented by the defendant to Her Majesty's Court of Bankruptcy, and afterward to wit, on, &c., a final order for protection and distribution was made in the matter of the said petition, by J. S. Fonblanque Esq., &c., a commissioner of the said court, &c., and that the causes of action in the declaration mentioned were contracted before the date of filing the said petition, &c. At the trial the defendant offered, in support of his plea, a final order, in the form directed by 7 & 8 Vict., c. 96, schedule (A.) No. 3. This order being for the protection only of the person, it was objected that it did not support the plea of an order for protection and distribution, and the judge so directing the jury, a verdict was found for the plaintiff.

Hake, in Trinity Term, 1847, obtained a rule for a new trial.

Humfrey now showed cause.—The question in this case was already decided by *Toomer v. Gingell* (3 C. B. 32). There the defendant had pleaded to an action for debt a final order, under 7 & 8 Vict. c. 96, for protection of person, in respect of debts contained in his schedule, and the court held the plea to be bad. It was then observed *Maule, J.*, that "the 10th sect. of the 5 & 6 Vict. c. 116, ma

a plea, setting up a final order *for protection and distribution*, a sufficient plea in bar; but there is no section in the 7 & 8 Vict. c. 96, that makes a final order for protection of the *person* of a petitioner from being taken or detained under any process, pleadable in bar.

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• • • It may have been the intention of the last act, that if the assignee does not take steps to possess himself of after-acquired property of the insolvent, a creditor may.

• • • It may have been the intention of the 7 & 8 Vict. c. 96, to take away the entire defence given under the former acts, and to give protection to the *person* only of the insolvent, leaving his further acquired property still subject to his debts."

Hake, in support of the rule.—Under 5 & 6 Vict. c. 116, there were two ways of taking advantage of a final order, one by pleading the general issue under the 10th section, the other by pleading specially all the requisites of a good final order, under the 4th section. Where the latter course was taken it was necessary to state and prove everything that was essential to bring the case within the provisions of the section. (*Leaf v. Robson*, 13 M. & Wel. 651; *Dook v. Henson*, 3 D. & L. 177; *Lewis v. Harris*, 17 L. J., N. S., Q. B. 129). The plea in *Toomer v. Gingell* was bad, for not properly describing the order, and not for the reason supposed on the other side. Here the form required by the statute has been adopted. The 5 & 6 Vict. c. 116, has been only partially repealed by 9 & 10 Vict. c. 96. The 74th section of the latter enacts, that nothing therein contained shall be construed to repeal, affect, or in any manner alter the provisions of the former act, except as therein is expressly provided, or so far as the provisions of the former may be inconsistent with the latter. They are to be read as if they were incorporated, and may be used to explain one another. So read, there is nothing in the last act which takes away the powers and rights of assignees under the first act.

Cur. adv. vult.

PLATEL v. BEVILL.

This was an action by the payee against the maker of a promissory note, to which a similar plea had been put in, and a demurrer upon other points, which were overruled. But the same objection was also taken as in *Jacobs v. Hyde*, and the court reserved it for consideration at the same time, and now gave judgment in both cases.

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JUDGMENT.—May 31.

ROLFE, B.—In the course of the argument in this case the court intimated its opinion that the plea was sufficient in form, and stated also that, by the statute of the 5 & 6 Vict. c. 116, s. 10, a final order constituted a good defence. The only remaining

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question is, whether a final order obtained under the 7 & 8 Vict. c. 96, constitutes an absolute bar to an action for the debt as to which it is a protection, or operates only as a protection to the person of the insolvent; in which latter case it ought not to be pleaded as an absolute bar, but specially in bar of execution against the person only. We are of opinion that it is an absolute bar, and consequently our judgment must be for the defendant. We have to construe the provisions of two acts of Parliament, which are by no means clearly expressed, especially the latter, the wording of which, particularly of the form given in the schedule for the order of protection, is likely to mislead the reader; but on careful consideration of the clauses of both acts, we think the intention of the Legislature is sufficiently plain, and that there is no difference in the legal effect of the final order given under the second from that given under the first act, as to the discharge of the insolvent. In both we are of opinion that it constitutes an absolute bar to the actions in respect of which it is a protection, as it is admitted it did under the first act. The last act terms the final order to be made "*under the provision of the said act, as amended by this act.*" (Sect. 22.) The section then proceeds to define from what debts the person is to be protected (adopting the language of the old Insolvent Act, 7 Geo. 4, c. 59, s. 46), and directs the form in the schedule to be followed; but the power of making the final order arises from the *former act*, and its effect is the same as under the former acts, except so far as it is varied by the latter. Sect. 74 of the latter act directs "that nothing therein contained shall be construed to repeal, affect, or in any manner alter the provisions of the 5 & 6 Vict. except so far as herein expressly provided, and except so far as the provisions of the *thin* recited act may be inconsistent with, or at variance with, the provisions of this act." Now the last act does make certain express alterations. It provides a more easy way of petitioning for the protection from process in the first instance (which petition is still to be *under the former act*), for it dispenses with notice in the *Gazette*, &c. It also provides for the appointment of the creditor's assignee, and the vesting of the estate in him by the appointment prior to, or at least independently of, the final order; whereas under the former act, the creditor's assignee had not the estate vested in him until the final order, which by sect. 4 was to be for the protection of the person of the insolvent, and *vesting the estate in the creditor's assignee*, and also in the official assignee, to be named by the commissioner. An alteration is made in the effect of the assignment to the official or creditor's assignee by sect. 1, by vesting powers in them; by sect. 19, vesting in them goods in the apparent ownership of the insolvent. But with respect to property acquired after the final order, no alteration seems to have been made. By the first act, on the passing of the final order, the estate, *present and future*, of the insolvent, vests in the assignee as under a fiat; but then by sect. 9 the assignee must file a claim in order to take after-acquired effects, and cannot take possession

an order from the commissioners or the Court of Review; both sections being read together, it seems that the assignees present property absolutely, and have a right to obtain all subsequently acquired by the insolvent. This is the only reconciling these contradictory clauses. The 4th section, added by the 73rd, leaves no doubt on this question under the act, for the appointment vests the property of the insolvent, all present and future estates which shall come to him *he shall have obtained the first order*, leaving all subsequently-acquired property to be dealt with under the former act; for the repeal of that act is certainly not repealed. In our view, the rights of the assignees to after-acquired property are the same under both acts. The alterations above noticed and others are made by the 7 & 8 Vict.; but that statute makes no alteration in the effect of the order *as a defence*—at least no express alterations; it leaves the 10th section, which gives the defence, unrepealed. There is no enactment in the new statute which is inconsistent with the provision that the final order should constitute a sufficient plea in bar; and, therefore, by the 7th section, that provision will be in full force. If the former act had vested all subsequently-acquired property in the assignees, and the latter act altered this, there would have been ground for the implication that the Legislature meant to do away with the absolute defence by the 10th section, and to leave the creditors to take their remedies against subsequently-acquired property by *fiery facias*. We think the rights of the assignees to after-acquired property are not affected, and consequently that such implication does not arise, and there is, therefore, no inconsistency or variance between the first and second act in this respect to authorize us to reject the 10th section as being impliedly repealed by the new act. The proviso given by the schedule, it is true, protects expressly the person of the insolvent, and the giving such a form is no doubt an incautious mode of legislating, and is calculated to mislead. But then the final order directed by the first act is no more than an order of protection of the person. Section 4 says the order shall be called a *final order*, and shall be for the protection of the *person from creditors*; and for vesting of the estate, which latter operation is now otherwise provided for; but its effects as a measure of protection are in terms for the protection of the person: not a word is added to be introduced that imports any protection but that of *persons* in the order itself. The privilege of pleading it in bar is entirely from the 10th section, which describes the legal effect of such an order as “*an order for protection and distribution*,” an inaccurate expression, no doubt; for there is nothing in the order as required by the first act in general terms, and particularly added in the schedule to the second act, which takes notice of a distribution or requires it. The final order under the second act is an order for distribution; but neither was the final order directed by the first act; and if the 10th section allows the order to be pleaded in inapposite terms, the same direction must be fol-

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lowed as to that required by the second, and it may also be pleaded in the same inapposite terms. Considering the two acts together, as one system, we see no reason to suppose that the Legislature, which clearly meant to give facilities to the debtor to obtain his discharge, intended also to limit the operation of that discharge under the new act—all his property, present and future, being disposed of for the benefit of creditors in the same way in both acts, and we think that the legal effect of the discharge is the same in both acts, and that the effect, inartificially described in the 10th section, belongs just as much to an order under the second as under the first act. This view of the two acts differs from that which my brother Maule is reported to have taken in the case of *Toomer v. Gingell* (3 C. B. 322; 4 Dowl. & L. 182). The question in that case was not fully argued; the learned counsel for the defendant acted upon the impression as to the meaning of the second act, which its language is at first sight so likely to create, and abandoned the argument. Upon the best consideration we can give to these acts, we think that the impression was a wrong one, and that the effect of the final order is the same under both acts.

Judgment for the defendant.

Jacobs v. Hyde is decided by this, and the rule must be absolute.

Rule absolute.

COURT OF QUEEN'S BENCH.

Trinity Term, 1848.

Ex parte BOWDLER.

Commitment under 8 & 9 Vict. c. 127, s. 1—Warrant not under seal—Commencement of imprisonment—Proper custody—Whitecross-street prison.

An order of the judge of an Inferior Court of Record for the recovery of small debts, made under sect. 1 of 8 & 9 Vict. c. 127, first recited a summons calling upon A. B. to show cause why he did not pay the amount of a judgment recovered in that court, and the nonappearance of A. B. to that summons, and then ordered him to be imprisoned for forty days "in the common gaol wherein debtors under judgment and in execution of the superior courts may be confined within the county of Middlesex."

Held, that the order was valid, though not under seal; and although it appeared to have been made in the absence of the person committed. It appeared that the prisoner was confined in a gaol locally situated in the city of London, but built under an act of Parliament, and used as a debtors' gaol both for London and Middlesex;

ce to the said writ the following warrant of commitment,
only cause of detention :—

the court of Her Majesty's palace, at Westminster, an
Court of Record for the recovery of debts.

a court held the 2nd day of June, in the year of our Lord,
the court-house, Westminster, within the jurisdiction of
it;—

v. Bowdler.—Whereas Nathaniel Bowdler, at the time of
ing of the summons hereafter mentioned was and now is
l to William Young Fell in the sum of 8*l.* 9*s.* and no more,
costs of suit amounting to 5*l.* 14*s.* 2*d.* by virtue of a judg-
tained in this court for a cause of action within the jurisdic-
reof, on the 12th day of April, in the year of our Lord,
appears to the court here by the record of the said judg-
And whereas the said William Young Fell did on the 20th
day, in the present year, obtain a summons from this court
orm prescribed by an act for the better securing the pay-
small debts, passed in the session of Parliament held in the
9th year of the reign of her present Majesty, and upon an
ion by him in writing, according to the form given by the

And the said Nathaniel Bowdler, at the time of granting
nmons, resided, and was and now resides and is within the
ion of this court; by which summons the said Nathaniel
was required to appear before this court at the court-
oresaid this day; and whereas the said Nathaniel Bowdler
en duly served with the said summons within the jurisdic-
his court, but he hath not attended as required by the said
s, and hath not alleged a sufficient excuse for not attending.
do therefore order that the said Nathaniel Bowdler shall
mitted for the term of forty days to the common gaol
debtors under judgment, and in execution of the superior
f justice may be confined within the county of Middlesex,

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(Endorsement.)

"Defendant is entitled to his discharge upon payment of 14*l.* 3*s.* 2*d.* and all subsequent costs.

"Taken in custody, June 6, 1848, and lodged in the prison for the county of Middlesex the same day. Defendant a publican, residing at Poplar, in the county of Middlesex.

"2*l.* 12*s.* 6*d.*

H. HERRI

The affidavit on which the writ issued stated that the prisoner, which the applicant was confined was situate in Whitercross in the city of London.

Pashley now moved that the prisoner be discharged.—1*st* The commitment is to a gaol in the city of London; whereas the writ of commitment given by the statute 8 & 9 Vict. c. 127, "To the common gaol, wherein the debtors under judgment execution of the superior courts of justice may be confined the county, city, borough, or place in which such debtor is resident;" and this debtor appears to have been resident in the county of Middlesex; so that he ought to have been committed to the debtors' gaol within the county of Middlesex. When the street prison was built under 52 Geo. 3, c. ccix. which is an act for building a new prison in the city of London; and, no doubt the new prison for Middlesex, as well as London debtors; but then 8 & 9 Vict. c. 127, s. 1, must be construed strictly; and, according to a strict construction of that clause, the commitment ought to have been to a prison locally situate within the county of Middlesex. He cited *Brandling v. Barrington*, 6 B. & C. 467; *R. v. Ellis*, 6 Q. B. 501. For this is certainly a penal enactment. The imprisonment is not to operate as satisfaction of the debt (sect. 3.) [PATTESON, J.—No; but it is not at all a process for contempt, because the party is to be discharged on payment of the money. I was expressly called upon to decide that point in a case where a party committed for non-appearance claimed release from arrest, on the ground of attendance upon the Queen's Bench, which would be no ground in a case of commitment for contempt and I discharged the prisoner, because I thought it was not a commitment for contempt.] The discharge is discretionary; but the discharge is to be *by leave of the judge*, and that leave was refused. [PATTESON, J.—I apprehend the judge would have granted the discharge after payment.] In *Ex parte Kinning*, 1 (Macrae, 1, all the judges of the Common Pleas held the writ to be highly penal. 2*nd*. The warrant is made on the 2*nd* of June, and the commitment is for forty days; but it is not expressed in the warrant from what day the term of imprisonment is to count. This is essential in order to enable the gaoler to know when to discharge him. In principle the defect is the same as if the warrant was without any date; and Patteson, J. held an arrest warrant of commitment bad: (*Re Fletcher*, 1 D. & L. 726.) What is the consequence? A warrant may be obtained, kept for months, and then executed upon the defendant when he is at a great distance from his home. (See s. 22.) This mischief sho

rtance of the next objection. 3rd. No order of commitment be made by an inferior court except in the presence of the n committed; and this prisoner appears not to have been pre- when this order was made. [PATTESON, J.—The statute ssly says, “In case such debtor shall not attend as required o said summons, and shall not allege a sufficient excuse for not ding, then it shall be lawful for the judge of such court to such debtor to be committed.”] Yes; but he must first be ght before the court. (*Ex parte Magee*, 6 Madd. 206; *Evans es*, 12 Ad. & E. 55; *Painter v. The Liverpool Gas Company*, l. & E. 433.) In *Mr. Cobbett's case* the learned Baron thought eturn bad, because it did not appear that Mr. Cobbett was nt when committed. Lastly, the warrant is under hand only; any instrument ordering imprisonment must be under seal. cases are collected in *Re Clarke*, 2 Q. B. 619, 626; and so long e distinction prevails in law between simple contracts and con- s under seal, it is not too much to require that any instrument, hich a man is sent to prison, should bear upon the face of it impress of solemnity which a seal is supposed to give,—more sially as all the authorities seem to require it. He cited 2 Inst. Hale's P. C. 463, 577; Hale's Summary, 94; Hawk. P. C. 2, c. 16, s. 13; Burn's Justice, tit. “Commitment;” Paley Convictions, 232; *R. v. Austrey*, 6 M. & S. 319. [ERLE, J.— at was decided on the words of a particular statute, and upon ground that there were not as many seals as officers.]

Corrie, contra, was not called upon.

LORD DENMAN, C. J.—It does not appear to me that any of ne objections can be sustained. With respect to the seal, that jection touches the nature of the instrument; and I think that eal is necessary when the words of the statute are merely that e judge may “order” imprisonment. Then as to the prison to hich this debtor has been sent, it is the debtors' prison for London d Middlesex; but it is said that it is described as “within the nty of Middlesex,” and that the prison in which he is confined ot in Middlesex; but I think that it is in Middlesex for this upose. The next objection has relation to the date, and *Re eicher* was cited; but that case does not apply, because there the urrant was without date, and here it has one. If it did, that cision has been much canvassed; and there is much reason to bt whether it could be sustained. It may be quite impossible tate on the warrant from what particular day the term of im- onment is to run. It ought to run, of course, from the time en the person is taken; and that must be a matter of evidence on which the gaoler must decide. At the back of this warrant, re is a statement of the time when the prisoner was taken into ody, and that is a very correct and convenient thing to do.

PATTESON, J.—This act of Parliament provides that “it shall lawful for the creditor so having obtained a judgment (which in this case a judgment of the same court), to obtain a sum- s from any commissioner of the Court of Bankruptcy for the

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district in which such debtor shall reside or be, or from any Court of Request, &c., or Inferior Court of Record for the recovery of debts, &c., within the jurisdiction of which such debtor shall reside or be;" by which summons he is required to show cause why he has not paid the sum recovered; and "in case such debtor shall not attend as required by the said summons (the case here), an shall not allege a sufficient excuse for not attending, then, in such case, it shall be lawful for such commissioner, or the judge of such court, to order such debtor to be committed for any time not exceeding forty days, to the common gaol wherein the debtors under judgment, and in execution of the superior courts of justice, may be confined within the county, &c., in which such debtor shall be resident." Now, I do not understand those words as applying to the local situation of the building within the county; but I take it to mean that the commitment must be to the gaol in which the execution debtors of the county may be confined—that is, if the person resides in county A. he is to be imprisoned in the gaol in which the debtors of that county may be confined. This prisoner was a resident in the county of Middlesex, and this is a gaol for the debtors of London and Middlesex, though the building is locally situate in the city of London. I think, therefore, that the custody is proper, and that that objection fails. The next objection is, that the order is not under seal, but I see nothing in the act of Parliament which requires that. The act only says, "it shall be lawful for the judge to order," and he has ordered, as appears by the return to this writ. Then it is said that the time from which the period of imprisonment is to run is not specified; and it appears that in *Fletcher's case* I thought the warrant bad for not specifying when the three months was to commence. I dare say I may have been influenced in that case by finding that the prisoner was brought before me on *habeas corpus* long after the time when the three months would have expired; but it is quite clear to me now that the term of imprisonment must commence from the time when the man is taken into custody. The gaoler's duty was to inquire how long the prisoner had been in the custody of the officer, and then to calculate the forty days from that time. Another objection was, that the party ought to be before the court at the time of his commitment; but I think that is not so under this act of Parliament. Many cases were cited, but I am not aware that, after the failure of a distress warrant, a warrant to arrest the person may not be immediately issued; and this act expressly authorizes an order for the commitment of a debtor, if he does not attend in obedience to the summons, or does not allege a sufficient excuse for his non-attendance,—that must, of course, be by some person attending on his behalf. Now that, I say, is not a commitment for contempt of court; but, to adopt the expression of my brother Maule, it is a commitment for the delinquency of the debtor. His non-attendance is an admission by default that he has no reason to show why he should not pay the money; and he is, therefore, in delinquency in not paying. The forty days' im

in that case, it appears that the debtor was ordered to be imprisoned for forty days from the time of his being arrested; and it is better to insert those words; but, if they are omitted, the effect of the instrument is the same.

2, J.—I am also of the same opinion. The prisoner was committed, under sect. 1 of 8 & 9 Vict. c. 127, by order of a judge, and that is the order of a judge in court. There is no objection for the assertion that an order of court must be understood though by statute, orders of magistrates are required to be in writing. To the objection, that the order does not show when the imprisonment is to begin, so as to compute the term of it, the answer is that the intent of the statute was that the party be deprived of his liberty for forty days, and that will run from the time of his arrest. It is the gaoler's duty to comply with that. To the objection that the commitment is void because the prisoner is committed to a gaol within the city of London, there is no answer; first, the meaning of the statute is that the prisoner shall be confined where debtors in execution may be committed for debt; this prisoner is a Middlesex debtor, and properly committed where other Middlesex debtors are sent. Secondly, the gaol must be within the ambit of the county, to this gaol is referred by 2 Geo. 3, c. ccix, given all the incidents which attached to Middlesex prisoners in Newgate. For all purposes of the question in question, therefore, the prison is within the county of Middlesex. Lastly, to the objection that the party has been committed for contempt without having appeared, the answer is, that every word of the statute has been complied with.

Prisoner remanded.

BAIL COURT.

May 5, 1848.

(Before Mr. JUSTICE COLERIDGE.)

SPARROWE v. REED.

New trial—Jury.

Quære, whether the judge of a County Court, upon a motion for a new trial in a cause not tried before a jury, has power, in granting a new trial, to direct that the second trial shall be had before a jury?

But where, on such a motion, the judge ordered the costs of the application to be paid to the party resisting the application, which costs the party receives, he cannot afterwards object to the order, on the ground that the judge had no power to direct the cause to be tried by a jury.

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HUGH HILL moved for a rule for a *mandamus*, commanding the judge of the County Court of Sussex (Brighton) to give effect to his judgment of the 18th of October, 1847. It appeared that in October last the plaintiff entered his plaint for 20*l.*; and that on the 12th of November the case came on for hearing before the judge (no notice having been given for a jury); upon the hearing, the judge made his order in favour of the plaintiff, and adjudged that he should recover 20*l.* for his debt, together with 4*l.* 2*s.* 6*d.* costs. Upon a subsequent day, in the same month, the defendant applied for a new trial, and, at the same time, requested that the case might be tried by a jury; this application, in both particulars, was resisted by the plaintiff, but the judge made an order that the judgment, and all subsequent proceedings, should be set aside, and a new trial had, on condition that the defendant should pay the plaintiff the costs of the application, &c.; and he further ordered that the cause should be tried by a jury. The cause accordingly came on again for trial on the 10th of last December, when the jury found a verdict for the defendant. It was now objected that the judge had no power to order the cause to be tried by a jury in the manner that he had and that the second trial accordingly was *coram non jndice*; for that rule 20 (founded upon sect. 70 of the 9 & 10 Vict. c. 95), which regulates the practice as to obtaining a jury, directs that "every notice of a demand of a jury, where the debt or demand claimed shall exceed 5*l.*, must be made in writing to the clerk of the court two clear days before the return of the summons," and that the judge himself had no power to grant a jury, which can be obtained only in the manner pointed out by the foregoing section and rule; and the 89th section, giving the judge power to grant

1, "to be had upon such terms as he shall think reasonable, not extending to enable him to grant a jury.

RIDGE, J.—Did the plaintiff go to the second trial?

W.—He did; but he would not deprive himself of his right from having done so. SPARROWE
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RIDGE, J.—Did he receive the costs as provided for by the order?

W.—He did; and it will be a question, certainly, whether, obtaining a partial benefit under the order, he can be heard to object to it.

RIDGE, J.—The point intended to be raised by this is a very proper and important one; but I think, in this or case, I ought not to grant a rule, if it appears that the defendant has acquiesced in the order. If he had merely gone to trial no more, I think there would have been nothing to have prevented his making this motion, as he was, to a certain extent, to have attended the trial; but he was not bound to take the verdict, which he has done, and by doing which I think he has precluded himself from taking this objection. I think, therefore, there could be no rule.

Rule refused.

BAIL COURT.

May 9, 1848.

(Before Mr. JUSTICE COLERIDGE.)

NIND v. RHODES.

Question—Sufficiency of affidavit—Bills of exchange—Jurisdiction.

An application to enter a suggestion upon the roll to deprive a plaintiff of costs, on the ground that the action should have been tried in the County Court, it is not necessary to negative that the plaintiff of the superior court certified that the action was fit to be tried in such superior court (9 & 10 Vict. c. 95, s. 121.) Bills of exchange are not within sect. 129, so as to give the plaintiff the right of suing upon them in the superior courts, as having no locality attached to them.

STOW, in Hilary Term, obtained a rule calling upon the plaintiff to show cause why the judgment should not be entered for the amount of the verdict alone, or why a suggestion should not be entered to deprive the plaintiff of costs. In this case a bill had been brought in this court against the defendant, acceptor of a bill of exchange for 12*l.*, for which amount a verdict was returned. The parties resided within the jurisdiction of

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the Clerkenwell Metropolitan County Court. The affidavit upon which the rule was obtained stated all the facts necessary to bring the case within sect. 129 of the 9 & 10 Vict. c. 95, but did not state that the judge who tried the cause had not certified on the back of the record "that the action was fit to be brought in such superior court," as provided by the last clause in the foregoing section.

Lush showed cause, and contended, as a preliminary objection, that the affidavit on which the rule was obtained was insufficient inasmuch as it did not show that the judge had *not* granted the certificate provided for by sect. 129 of the 9 & 10 Vict. c. 95; that the defendant, to avail himself of the advantage of this section, should exclude every presumption in the plaintiff's favour, notwithstanding all the facts stated in the defendant's affidavit; it might still be that the judge had granted this certificate, which would have entitled the plaintiff to costs.

COLERIDGE, J., called upon *Barstow* to answer this objection.

Barstow.—This is the nature of an exception in the section, and if such a certificate had been granted, the plaintiff, who must have been cognizant of it, should so have stated, it being a fact peculiarly within his knowledge, particularly as he, from having the verdict, has possession of the record, and the certificate, if such there were, may have been granted *after* the trial, and of which the defendant may have been in ignorance; moreover, that the present motion is merely to inform the conscience of the court, and is not even final between the parties, since the suggestion may be traversed.

COLERIDGE, J., called upon *Lush* to proceed with his argument.

Lush then argued that bills of exchange are not within the provisions of the act, inasmuch as the idea of *locality* does not attach to them; that the whole scope of the act applies to contracts which may be said to have a locality, which is manifested by the language of sect. 128, which exempts from the jurisdiction of the County Courts causes of action which "did not arise wholly or in some material point within the jurisdiction of the Court within which the defendant dwells," &c.; that in contemplation of law a bill of exchange has no locality, for which reason the venue in such an action cannot be changed.

Barstow, contra, contended that the words in the section bear in themselves sufficiently large to include bills of exchange, the object of the Legislature being to bring within the jurisdiction of the County Courts all small pecuniary demands, there being a substantial reason why bills of exchange should be excluded, the Legislature having carefully pointed out what kinds of claims should not be adjudicated upon in the County Courts, and not having otherwise excluded bills of exchange, although, from the language of sect. 97, it is clear that such securities were not lost sight of, and must be gathered that they were not intended to be exempt from the jurisdiction of the County Court.

Lush explained that he did not contend that the County Court

not concurrent jurisdiction, but that bills of exchange were within sect. 128.

CLERIDGE, J.—I understand it to be admitted that the County Court may have concurrent jurisdiction. The section giving the general powers to the County Court is the 58th, which gives it jurisdiction in all pleas of personal actions where the debt or value claimed is not more than twenty pounds; and then there is a proviso, which is very minute, which excludes any action of ejectment, in which the title to any corporeal or incorporeal hereditaments, or any toll, &c. shall be in question, or in which the validity of any lease, &c. may be disputed, or any action for malicious prosecution, or for any libel or slander, or for criminal conversation, or for breach of promise of marriage. Now it is clear that a bill of exchange would come within the general words, and it is equally clear that they are not within the exception; then, if the County Court has a general jurisdiction over them, what is there which excludes them? I do not find anything in the 129th on which gives a concurrent jurisdiction where the cause of action “did not arise wholly, or in some material point, within the jurisdiction of the court within which the defendant dwells, or is on his business, at the time of the action brought.” I think, unless you can show that the cause of action did not arise within the jurisdiction, that the jurisdiction must be considered to have attached; and, I think that it has done so in the present instance. I think, therefore, that ground of objection under the rule fails. I should like to consider the objection as to the affidavit.

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Cur. adv. vult.

THE LORDSHIP said, I suspended my judgment upon one question in this case, because, as it was a matter of frequent occurrence, I thought it right to consider the subject very maturely. This was an application to deprive the plaintiff of his costs, on the ground that he had brought his action in this court, when he ought to have gone to the County Court, and the affidavit upon which the rule was obtained set forth all the facts, which, *prima facie*, brought the plaintiff within section 129 of the 9 & 10 Vict. c. 95, but it did not state that the judge who tried the case had not certified that the action was fit to be brought in the superior court, and Mr. Lush in his argument relied upon this omission, and said that every thing stated in the affidavit may have been true, and yet a certificate may have been granted which would have entitled the plaintiff to his costs. But the answer given to this objection by Mr. Barstow is, I think, a good one, that as the fact of a certificate having been given, if it was given, was peculiarly within the plaintiff's own knowledge, and he could have brought it before the court if it had any existence, I must take it, as he has not done so, that there was in fact no such certificate. The rule, therefore, must be made absolute.

Rule absolute.

COURT OF QUEEN'S BENCH.

*April 15, 1848.**Re THE COUNTY COURT OF LANCASHIRE.**Replevin—Jurisdiction.*

*In replevin the County Court has jurisdiction, although the damage laid above 20*l.* and it is no ground for a prohibition that a verdict is given for damages above that sum.*

*Re THE
COUNTY COURT
OF
LANCASHIRE.
Replevin.*

ARCHBOLD moved for a rule *nisi* for a writ of prohibition in the County Court of Lancashire. An action of replevin had been commenced in that court, and the damage laid at 200*l.* The verdict actually obtained for 75*l.* This is beyond the jurisdiction of the County Court, which by sect. 58 is limited to 20*l.* In the Superior Court the damages in replevin are only three guineas. [ERLE, J.—Is not a replevin suit in the County Court at common law, transferred at the second stage into the new court? It is submitted that the 58th section rescinds the clauses as to replevins. [WIGHTMAN, J.—Where is a replevin suit to be commenced now?] At common law replevins were by writ of Chancery, and goods were not then handed over, but detained until the determination of the action. [WIGHTMAN, J.—Is the proceeding by plaint? ERLE, J.—At common law the County Court has jurisdiction in replevin above 40*s.* (4 Inst. 104.) The new act cuts down this power. [PATTESON, J.—The section contemplates the cause going on where more than 40*s.* is sought to be recovered, and gives power to either party to remove the cause in certain cases.] It never could have been intended to give the County Court limited jurisdiction.]

LORD DENMAN, C.J.—The words in the 58th section are to restrain the jurisdiction of the court as to replevin.

PATTESON, J.—The effect of the statute, that whereas before *re fa. lo.* might in any case have been obtained, it is now subject to the conditions imposed by the 121st section.

WIGHTMAN and ERLE, JJ. concurred.

Rule refused.

COURT OF QUEEN'S BENCH.

November 25, 1848.

SUGGETT v. COLE.

Suggestion—Affidavit—Decision of judge at chambers.

on the hearing of a summons before a judge at chambers, to enter a suggestion on the roll to deprive the plaintiff of costs under the County Courts Act, an objection was made to the sufficiency of the affidavit; and the summons was adjourned that the affidavit might be amended. The matter afterwards came on upon the amended affidavit, and the judge made the order. Upon application to rescind that order, this court refused to entertain any objection to the sufficiency of the affidavit which had not been made at chambers.

The order did not in terms require the roll to be brought in.

It did to be unnecessary.

It was held, that an affidavit, merely stating that the action ought to have been brought in the Bloomsbury County Court, as the plaintiff and defendant resided in Holborn, is insufficient to show a residence within the jurisdiction.

RULE had been obtained calling on the defendant to show cause why an order of Patteson, J., directing a suggestion to be entered on the roll, to deprive the plaintiff of costs under the County Courts Act, should not be rescinded. The affidavits showed that when the summons came on originally before Patteson, an exception was taken to the sufficiency of the affidavit, on the ground that it did not state that the parties were not officers of court. The learned judge thereupon adjourned the summons, and the affidavit might be amended. The case afterwards came on on the amended affidavit; and some further objections having been taken and overruled, the order was made. The present rule was then obtained, on the ground, 1st, that the judge at chambers had no power to make the order; 2nd, that the original affidavit was ineffective in other respects than those mentioned at chambers. The objection was, that the affidavit stated that the action ought to have been brought in the Bloomsbury County Court, as the plaintiff and defendant resided in Holborn, and the cause of action was a material part arose within the jurisdiction of the Bloomsbury County Court, not stating that Holborn was within the jurisdiction of the court.

The court showed cause.—1. A judge at chambers has power to make the order: (*Smeeton v. Collier*, 17 L. J. 57, Exch.; *Peterson v. Smeeton*, 1 Cox & Macrae, 148.) 2. No objection can now be taken to the affidavit, which was not taken at chambers; or if so, the

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court will take judicial notice that Holborn is within the jurisdiction of the Bloomsbury County Court. [COLERIDGE, J.—How can we do that?] It is also said that the affidavit ought to negative the proviso of sect. 58, but it is for the plaintiff to bring the case within it.

Temple, contra.—The defendant must bring the case clearly within the act in order to deprive the plaintiff of costs; he must, therefore, show residence within the jurisdiction: (*Meeten v. Nicholls*, 1 Cox & Macrae, 123); *Matthew v. Broughall*, 1 Cox & Macrae, 125; *Bailey v. Robson*, 1 Cox & Macrae, 122.) [COLERIDGE, J.—But if this objection had been taken at chambers with the others, it might have been corrected in a moment; is it not waived? ERLE, J.—Many orders are made at chambers entirely upon admissions.] The learned judge had no jurisdiction under the circumstances, to make the order; and parties cannot be concluded by the admission of attorneys' clerks at chambers. At all events the order is bad on the face of it, because it does not require the roll to be brought in. [ERLE, J.—The roll is in court.]

LORD DENMAN, C. J.—This rule ought to be discharged. Taking it to be necessary that it should appear that one of the parties resided within the jurisdiction, I assume that my brother Patteson had that fact before him. It is not necessary that it should appear by affidavit; it may appear by admission. As to the bringing in of the roll, that is involved in the order.

COLERIDGE, J.—We need not decide more than the particular circumstances of this case require. At chambers an objection was made to this affidavit; upon which, the affidavit was amended. Then other objections were taken and overruled; and now we are desired to set aside the judge's order on other objections which were not taken; but I think we must treat those as having been waived. Parties are as much bound by the conduct of attorneys' clerks who represent them at chambers as by the conduct of the counsel.

WIGHTMAN, J. concurred.

ERLE, J.—This is an application to rescind the order of a competent tribunal. When the powers of this court are exercised by a judge at chambers, the court reserves to itself the power of reviewing a decision, defective on substantial grounds; but the party who applies is bound to make out that the decision is substantially wrong; and what Mr. Temple has urged, leads me to the conclusion, that here the order was substantially right.

Rule discharged.

COURT OF QUEEN'S BENCH.

November 24, 1848.

LOWLEY v. ROSSE.

City of London Small Debts Court—Suggestion.

LOWLEY

v.
ROSSE.

Suggestion.

is case it was alleged that the cause of action arose within city of London. The action was *assumpsit* on a promissory and a verdict was obtained for 13*l.* 14*s.* 6*d.* The defendant obtained a rule calling upon the plaintiff to carry in the roll, or that the defendant might enter a suggestion under the London Small Debts Act (10 & 11 Vict. c. lxxi. s. 113), to the plaintiff of costs.

Woot showed cause, and contended that bills of exchange missory notes were *nullius loci*, and that the words, depriving plaintiff of costs in any action for any cause "for which a might have been entered in the Small Debts Court" (see Vict. c. lxxi. s. 113), applied only to cases where the plaintiff have been entered there. He referred to *Bailey v. Robson*, & Macrae, 122; and to Dwarris on Statutes.

Wood, in support of the rule, referred to *Nind v. Rhodes*, & Macrae, 122; and *Butler v. Corney* (1 Cox & Macrae, and observed that the words upon which the doubt had suggested in 9 & 10 Vict. c. 95, s. 128, were not to be in 10 & 11 Vict. c. lxxi. s. 112.

COURT thought there was nothing in the objection; but even if there were, the plaintiff might plead or demur to the objection.

Rule absolute.

BAIL COURT.

November 18, 1848.

FEARON v. NORVALL.

Jurisdiction—Recovery of tenements.

If the rent of premises do not exceed 50l. per annum, the Court has jurisdiction under sect. 122 of the 9 & 10 Vict. c. 95, if the annual value is greater than that amount.

Upon the hearing of a plaint under the foregoing section, the Court pronounced judgment in favour of the landlord, directing possession of the premises to be given up at a certain day severally after. The landlord, treating this judgment as a nullity, for being conformable to the act and the rules made under it, did act upon it, but commenced another action, and again sought judgment.

Upon a motion for a prohibition, moved upon the ground that the judgment, unreserved, was pending :

Held, that, as the first judgment was a nullity, the landlord was in treating it as such, and in commencing a fresh action.

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—
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tenements.

THIS was a rule calling upon the plaintiff to show cause why a prohibition should not issue, directed to the Court of Lambeth, to restrain further proceedings in this action. It appeared that, in July, 1847, proceedings were taken by the plaintiff against the defendant under sect. 122 of the 9 & 10 Vict. c. 95, to recover possession of some premises let to the defendant as yearly tenant. Upon the hearing of the cause, in the month of July, the judge gave judgment for the plaintiff; and, it being represented that the defendant had crops upon the premises, the judge ordered that possession should be given up upon the 24th of December. By the 122nd section of the 9 & 10 Vict. c. 95, the judge is required "to issue a warrant, under the seal of the court, to any bailiff of the court, requiring and authorizing him, within a period to be therein named, not less than seven nor more than ten clear days from the date of such warrant, to give possession of the premises to such landlord or agent," &c. ; and the judgment in such case, as provided by the rules framed and settled by the judges under that act, directs the defendant to quit and deliver up possession to the plaintiff, and the warrant should forthwith issue to enforce the adjudication. It was considered subsequently by the plaintiff, that the order for possession upon the 24th of December was invalid, being in conformity with the section and rule before quo, and that the defendant had abstained from acting upon it, and nothing therefore was

, 1848, the plaintiff commenced a fresh action in respect of the subject-matter, and judgment having been given in his favour, the present rule was obtained upon the ground, first, that the value of the premises exceeded 50*l.* a year, although the rent was not over that amount; secondly, that as there was at the time of the commencement of the present action a prior judgment existing in respect of the premises, the judge of the County Court had no functions to perform in the present cause.

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The plaintiff showed cause, and argued, first, that as the rent did not exceed 50*l.* per annum, it was immaterial what was the value of the premises, which also, upon his affidavits, he contended, was not over that sum; secondly, the judgment pronounced in the first action being invalid, from not having pursued the authority of the County Court, the action, nor being in conformity with the rules, the plaintiff was entitled to set it aside, and in commencing a fresh action, he was correct in treating it as a nullity and in commencing a fresh action. (*Jones v. Jones*, 1 Cox & Macrae, 92; *Fearon v. Norvall*, 127.)

The defendant, contra, contended that the former judgment was a valid judgment, and that it was quite competent to the judge to postpone the order for possession, as he had done, until a future period; a power clearly contemplated by the concluding words of sect. 78, which enacts that, "in any case not expressly provided for herein, the said rules, the general principles of practice in the superior courts of common law may be adopted and applied, at the discretion of the judges, to actions and proceedings in their several branches, and that being so, the plaintiff had no right to bring a fresh action pending that judgment: (*Frankley v. Wicks*, 127.)

RESON, J.—There is no pretence for saying that if the rent did not exceed 50*l.* per annum, and there is no fine, it is not the case of a leasehold, even though the value may be a thousand pounds. I am quite clear upon that. Upon the other question I will consider it.

Cur. adv. vult.

RESON, J.—I disposed of the first objection upon the argument clearly of opinion that if the rent did not exceed 50*l.* per annum, it was immaterial how great might be the value of the premises. As regards the second ground, it appears that a judgment had been given in the first action, and the second action being for the same premises, it was said that the court had no jurisdiction, and at the same time I expressed some doubt; but having looked at the rules of the County Court under the act, and the judges having held it to be necessary that there should be an adjudication upon proceedings under this act, and they considering the clause to apply to all cases, whether the defendant appears or not, I must conclude that the defendant's having appeared does not oust the jurisdiction of the County Court to adjudicate. Then, as to the second objection upon the first occasion. It appears that it was contrary to the act, for it is clear by the 122nd section, and the rules, that

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there is to be an adjudication, and the order must be for the defendant to quit the premises forthwith, and the warrant is to be executed at a period not later than ten days. But here it was for giving possession on the 24th of December. Upon this the landlord proceeded again, and now the objection that is urged is by a sort of plea of judgment recovered, and no doubt in an ordinary case this would be a good objection. If a judgment is pronounced it matters not in such cases whether it is good or bad, as it may be reviewed by a writ of error, but in such a case as this, there is no possible way of reversing the former judgment; and I think, therefore, the landlord had a right to treat it as a nullity. It would indeed, be very strange if there should be a judgment upon which the landlord cannot act, and which, nevertheless, prevents him from recovering his property. As the judgment, therefore, was a nullity, the landlord was justified in so treating it, and in proceeding again as he had done. The rule must be discharged.

Rule discharged with costs.

BAIL COURT.

November 14, 1848.

JONES v. OWEN.

Recovery of tenements.

The 122nd section of the County Courts Act, contemplates the ordinary relationship of landlord and tenant, and not that of mortgagor and mortgagee.

JONES
v.
OWEN.
—
Recovery of
tenements.

THIS was a rule calling upon the judge of the Caernarvonshire County Court and the plaintiff to show cause why a writ of prohibition should not issue to restrain all further proceeding therein. The facts of the case were as follow:—One Owen Williams, who was owner in fee of a certain tenement situated within the Portmadoc district of Caernarvonshire, some time in 1842, mortgaged the same to the plaintiff for a term of years. Williams afterwards, in the year 1846, by a deed of feoffment conveyed his equity of redemption and reversion to his son, who remained in possession until his death, after which his widow, the present defendant, still continued in possession. In May last the defendant received a summons under the 122nd section of the County Courts Act, calling upon her to show cause why she should not deliver up possession of the above premises to the plaintiff. The plaint was heard at Portmadoc on the 27th of May, when the judge gave judgment against the defendant, and ordered possession to be delivered in a month's time, unless in the mean time the mortgage money be paid. The defendant's attorney, upon the

intimated to the Court that the defendant intended to apply for a prohibition, upon which the judge ordered immediate execution (which by the act cannot be before seven days). The rule was drawn up on the 5th of June, the warrant of possession was executed on the 6th, and the rule was served on the 7th.

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Welsby now showed cause, and contended, 1st, that the application was too late, inasmuch as the execution was already complete and nothing remained to be prohibited; 2nd, the judge of the County Court had jurisdiction in this case, as the defendant was either tenant of the plaintiff or a person occupying without authority, either of which cases would come within the words of the section. That the affidavit of the mortgagor stated that the defendant's husband came into possession under an agreement with him to which the plaintiff had consented. She was therefore in possession as tenant, and liable to be ejected under the 122nd section.

Morgan Lloyd, contra.—As to the first objection, it was the fault of the judge and the plaintiff that the rule was not served before possession was delivered, as the judge had ordered immediate execution. Besides, it is not too late to move for a prohibition after execution, at least if there be anything capable of being restored: (*Fitzherbert's Natura Brevium*; *Roberts v. Humby*, 3 M. & W. 120; 2 Inst. 602.) This case is not within the 122nd section of the County Courts Act. That section only applies to cases where an actual tenancy exists, and does not apply to mere constructive tenancies. There must be a term or a tenancy determinable by a notice to quit; and it must appear that the term is ended, or the tenancy determined by a notice to quit; otherwise the court has no jurisdiction. In this case there was no proof of any tenancy; the defendant was either in possession as assignee of the mortgagor, or by an adverse title altogether; and if the agreement, sworn to by the mortgagor, created any tenancy at all, it was a tenancy from year to year; and, therefore, it was necessary, in order to give the court jurisdiction, to show that it had been determined by a notice to quit, which was not done in this case.

PATTESON, J.—This is clearly not within the act, which obviously refers to cases between landlord and tenant. (His lordship here read the section.) The section contemplates the ordinary relationship of landlord and tenant, and not that of mortgagor and mortgagee. If there existed any such agreement as that contended for, there should have been a notice to quit. The County Court, therefore, had no jurisdiction whatever. Then as to the question of whether or not this application was made in time. The rule was obtained on the 5th of June, the execution being on the next following day; I think, therefore, they came as soon as they could, and were in time. As there was in this case a total want of jurisdiction, the rule must be absolute.

Rule absolute.

BAIL COURT.

November 14, 1848.

FOULSHAM v. BOUGHEY.

Palace Court Costs—Prohibition.

FOULSHAM
v.
BOUGHEY.
—
Prohibition.

BORTHWICK moved for a prohibition to restrain the judge of the Palace Court from proceeding further in this action. The facts of the case were as follow:—The plaintiff sued the defendant in the Palace Court for the sum of 3*l.* 12*s.*, being the balance of an account, and obtained judgment by default, the costs of which were 8*l.* Both the parties lived within the jurisdiction of the Clerkenwell County Court. The present writ was moved for on the ground that, as the cause was triable in the before-mentioned County Court, the Palace Court ought not to have given the full of costs of suit. [PATTESON, J.—I do not see what reason I can interfere. The Palace Court has done nothing which it ought not to have done.] If this case had been tried in this court, the plaintiff would have been deprived of his costs [PATTESON, J.—Only upon a motion to enter a suggestion. Has any application been made to enter a suggestion? or any other course taken in that court upon the subject?] None. But that court has a power to inflict costs in such a case, it has a greater power than that which is assumed by the superior court.

PATTESON, J.—The Palace Court would know nothing about the matter, unless the party concerned brought the question before it in the shape of a motion to enter a suggestion or otherwise. In this court, for instance, if a man bring an action we cannot take notice of the question of costs, unless the defendant draw the attention of the court to it in the usual manner.

Rule refused.

SITTINGS AT NISI PRIUS.

Court of Queen's Bench, Guildhall, February 19, 1848.

(Before LORD DENMAN, C. J.)

BRYANT v. HATTON.

Trespass—County Court Officer.

Here a plaintiff in the County Court obtained a judgment, and execution was issued and a levy made by the bailiff of the court, who seized the goods of the plaintiff in the action, who thereupon brought suit for the trespass against the plaintiff in the action in the County Court,

and that the act was that of the officer of the court, and that the action, if maintainable at all, could only be sustained against such officer.

LEE, Serjt., and *Stammers*, for the plaintiff.

Gurney, Q.C. and *Bramwell*, for the defendant.

This was an action of trespass for unlawfully taking the plaintiff's goods. Plaintiff was an unmarried lady who resided at *vesend*, in a house belonging to, and occupied by, her brother-in-law and sister, Mr. and Mrs. Jenkins. The defendant had claims against these persons, and sued out a plaint in the County Court, on which he recovered a judgment for 5*l*. A writ of execution issued upon this judgment, and was directed in the usual manner to the bailiff of the Court. The writ was issued for levy on the goods of Jenkins, but in executing it the bailiff seized, with the rest, goods of the plaintiff. For this seizure the action was brought; but instead of being brought against the plaintiff, it was brought against the person who was the plaintiff in the action in the County Court. There was no question upon facts, and the only point was upon the legal right to maintain the action.

Gurney submitted that there must be a nonsuit. The plaintiff in the County Court could not by possibility be answerable for the act of the officer of that court. So far as the plaintiff there concerned, everything was regular and proper. His claim was the first one in point of fact; it was maintainable in point of law, as he obtained the judgment of the court. He had a right to demand of the County Court to award him execution on that judgment, and the court did so. For what afterwards occurred he was not responsible. Yet this action sought to fix a responsibility upon him,—a responsibility founded, not upon his own individual conduct, but upon an implied liability arising from mere relations of

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law. In cases before justices, when a party gave information, vided that information was true, the party was not held liable nor ought he to be held liable here. The act complained of the act of the officer of the court, and the action, if maintainable at all, was only maintainable against that officer. The only of bringing it against the party who was the plaintiff in County Court was to come upon a party who could not set the authority of the County Court in his defence, and who sought to be fixed with the consequences of an erroneous exercise of that authority, though with such exercise of it he had thing to do.

Shee, Serjt., for the plaintiff, contended that this action maintainable. The plaintiff in the County Court was the originator of all that had been done. But for him the law was not have been set in motion, and he was therefore answerable the injury, which, in consequence of its being set in motion, it brought upon the plaintiff. The bailiff of the County Court certainly the officer of that court, but he was also, in many cases the agent of the party. He was so in the present instance, the party for whom he had acted must therefore take the responsibility of his acts.

Gurney replied, and contended that the act of the County Court in giving judgment and awarding execution, was the exercise of judicial authority, which justified the officer in acting under and if he had exceeded the authority thus given to him, and wrongfully injured the plaintiff, he alone was individually responsible for that which had been his individual act.

LORD DENMAN, C. J., ruled that there was no legal ground maintaining this action against the present defendant, and therefore directed a nonsuit, but gave the plaintiff leave to replead to set it aside should the court be of a different opinion.

JUDGE'S CHAMBERS.

September 1, 1848.

(Before Lord Chief Justice WILDE.)

WARD v. BODDINGTON.

7 & 8 Vict. c. 96—*Execution.*

A plaintiff cannot, by the operation of the 7 & 8 Vict. c. 96, be taken in execution for costs on a nonsuit.

THIS was an application calling upon the defendant to show cause why the plaintiff should not be discharged out of the custody of the keeper of the Queen's Prison under the following circumstances:—

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—
Execution.

The plaintiff is an attorney, and had brought an action against the defendant to recover the sum of 3*l.* 6*s.* in the Palace Court, in which action the plaintiff failing to proceed, the cause was set down by proviso, and the plaintiff non-suited, the costs of the defendant being taxed at 9*l.* 18*s.* 6*d.* and judgment signed for the amount, upon which a writ of *ca. sa.* was issued, and the plaintiff taken in execution thereon.

On the part of the plaintiff it was contended by *Davies* (attorney), that the 57th section of the 7 & 8 Vict. c. 96, which enacts "that no person shall be taken or charged in execution upon any judgment obtained in any action for the recovery of any debt wherein the sum recovered shall not exceed the sum of 20*l.* exclusive of costs," was applicable to the case of a plaintiff as well as defendant; the express words of the statute being—"that no person shall be taken or charged in execution;" and the statute not having provided for, or made any exception in cases of a nonsuit, it must be taken that the Legislature did not intend that executions against the person should be enforced for costs only, and in support of such position cited the case *Newton v. Lord Albert Conyngham*, 17 L. J. 200, C. P., in which case the plaintiff had brought an action against the defendant, a provisional committee-man, in which the plaintiff was nonsuited; the defendant afterwards carried in the judgment-roll, and entered an award of *ca. sa.* for the amount of taxed costs; the plaintiff assigned as error the entry of the award of *ca. sa.*, and relied upon the 7 & 8 Vict. c. 96, s. 57. The Court of Error held, that the assignment of error was not frivolous, thereby holding that a writ of *ca. sa.* could not be awarded for costs on nonsuit.

Turner, for the defendant, urged that the 7 & 8 Vict. c. 96 was not applicable to the present case, which was intended to apply only to prevent the arrest of the defendant when a less sum than

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20*l.* was recovered, and had no relation to plaintiffs; were it wise, any man of straw might bring an action, and after putting the defendant to 200*l.* costs, the defendant would, in the event of a nonsuit or a verdict in his favour, be without any remedy against his person.

The LORD CHIEF JUSTICE said, with that he had nothing to do. On looking at the words of the statute, and the opinion expressed by the learned judges sitting in error, in the case of *Newton v. Lord Albert Conyngham*, he was clearly of opinion that the plaintiff was entitled to be discharged, and that a writ of *habeas corpus* could not be awarded for costs of nonsuit.

Order for the plaintiff's discharge forthwith accordingly.

BAIL COURT.

November 22, 1848.

(Before Mr. JUSTICE PATTESON.)

BYRNE v. KNIPE.

Jurisdiction.

*Upon an application, under sect. 98 of the 9 & 10 Vict. c. 95, the County Court has jurisdiction, though the sum exceeds 20*l.**

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v.
KNIPE.
—
Prohibition.

THIS was a rule for a writ of prohibition to be directed to the County Court of Clerkenwell, to restrain further proceedings in the cause. It appeared that in January, 1848, the plaintiff entered a plaint against the defendant for 20*l.* due in respect of rent, which plaint was heard on the 15th of February, when the defendant urged that an action was then pending against him at the suit of the plaintiff, in the Court of Exchequer, for the same cause of action, for the amount of 30*l.* The judge, however, gave judgment for the plaintiff, but suspended the time of payment until within one week after the cause in the superior court should be decided. Subsequently the plaintiff took out a rule to continue his action in the Exchequer, and paid the costs there and afterwards appeared in the County Court and substantiated that fact upon oath. No execution, however, was taken out upon this judgment. On the 24th of March the plaintiff issued summonses against the defendant, under sect. 98 of the 9 & 10 Vict. c. 95, which was for the original judgment of 20*l.* and the costs making together 22*l.* 7*s.* 4*d.* for which amount judgment was

ren, together with 1*l.* 10*s.* 2*d.* costs. The rule was obtained on the grounds that the judge had no jurisdiction; 1st, because at a time of the hearing of the first plaint, there was an action pending for the same cause in the Exchequer; 2ndly, because, upon the second summons, the amount sought to be recovered exceeded 20*l.*

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Willmore showed cause.

Bagley, in support of the rule.

The facts and arguments sufficiently appear by the following

JUDGMENT.

PATTESON, J.—Now that all the facts of this case come to be fully known, I think it one of the clearest cases in the world. The only object this court has in issuing a prohibition, where the inferior court has no authority, and has proceeded without jurisdiction. Look at the facts. Here was a suit for 20*l.* and there is no pretence for saying that it is not within the jurisdiction of the County Court. A rent is laid for rent. The defendant appeared on the day he is required to appear, and he alleged against the jurisdiction of the court that there was another action pending in the Exchequer for the same cause of action. It appeared that the judge hesitated about it, and took some time to consider how he should deal with the matter, because the suit in the Exchequer was not for rent, *nomine*, but upon a promissory note, which had been given in respect of a former bill of exchange; and I suppose the judge was satisfied that the consideration for the note was the rent; he did not consider his jurisdiction ousted, and he thought that this was in substance the same cause of action. I am of opinion that the judge was quite right, and he might, without excess of jurisdiction, have given absolute judgment, with immediate execution, without regard to the suit pending in the Exchequer, which was not, upon the face of it, for the same cause of action. But the judge considered that the two actions in substance were for the same money, and that it was hard upon the defendant that there should be a judgment in his court, and execution for the amount recovered in the Exchequer, while there might be a judgment in the Exchequer, and so the defendant would be subject to two executions; therefore he acted upon the power given by the 92nd section, which provides that the judge might make an order appointing a time when the debt should be paid, and that the money should be paid into court in pursuance of that power, and he made an order that the sum recovered by that judgment should not be paid until a week after the case in the Court of Exchequer should be decided, and therefore he hung it up, which he has power to do. He did not treat that order as part of the judgment. The judgment was for recovery of the amount. He was afterwards satisfied that the suit in the Exchequer had come to an end, and there was some doubt whether his information was quite right, according to date; but it was sworn that the suit in the Court of Exchequer

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had been discontinued and the costs paid. It did not appear that he made an entry that he was satisfied the suit was at an end, nor did it appear that execution issued; but, subsequently to that time, a summons was issued. Under the 98th section, when a party applies for a summons, that summons appears to be called a *plaint*. The use of the word *plaint* had better have been omitted upon the face of it. He was called upon to show cause, because it was stated on the face of the judgment to be for the debt and costs. There were several items, and 10s. 10d. was paid into court. How, it did not appear, but, taking these summonses together, they made the debt and costs 22l. 7s. 4d.—which appeared on the face of the summons to be the sum. It was true, that when the summons was heard another paper was drawn up, professing to be a judgment; and the whole case turned upon the question, whether that was to be taken in its literal sense. I cannot shut my eyes to the fact that this was not a fresh suit in the County Court to recover the amount of that judgment by another judgment, but that it proceeded upon the 98th section. Thus, the judge hearing the case and finding that the party could not pay, made an order that he should pay by instalments of 15s. every four weeks; and against that order this defendant is complaining. He had rescinded the order made before as to the payment of 20l. and cost within a week after the result in the superior court. He has power so to do by the 100th section; he had, pursuant to the section, rescinded the order which was inconsistent with the one now proposed to make, and which he had made in favour of the defendant, giving him time. And, then for that little matter of form in which the use of the word *debt* in the second order occasioned a motion was made for a prohibition. I think the motion ought never to have been made. The rule must be discharged with cost.

Rule discharged with costs.

BAIL COURT.

January 31, 1849.

HADDON v. GOMPERTZ.

Practice—Certiorari.

Application to a judge for a certiorari to remove a cause from the County Court, under sect. 90 of the 9 & 10 Vict. c. 95, is ex parte.

ANDER, Q.C., showed cause against a rule for rescinding the order of Mr. Justice Wightman, and to set aside a writ granted to remove a plaint from the County Court of Middlesex into this court. The rule was moved on the ground that the writ was obtained *ex parte*, whereas it should have been obtained by summons, calling upon the other side to show cause. (as was Practice. *Certiorari—*) (*Vict. c. 95, s. 90.*) In showing cause, the case of *Ex parte Dimsdale*, 17 Law J. 247, Ex. was cited, in which it was decided that such orders were properly made *ex parte*. *Anders* argued that it was still competent to the plaintiff to move the court with fresh materials.

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*Certiorari—
Practice.*

Rule discharged.

COURT OF QUEEN'S BENCH.

Trinity Term, 1848.

FOSTER AND ANOTHER v. TEMPLE.

Prohibition—Practice—Summons.

A summons has been dismissed upon the ground of variance from the plaint, a second summons may issue on the same plaint, dated as the first day on which the plaint was originally entered.

It was entered on 30th March, wherein defendant was rightly served as "H. T., executor of W. Thompson." At the hearing, the judge held the summons to be a nullity, and directed another summons to issue against the defendant, upon the original plaint, numbered as the first summons.

But he had properly done so.

In this case a plaint had been entered in the Westminster County Court of Middlesex, upon the 2nd of April, 1848, for goods sold and delivered to have been supplied by the plaintiff to one William

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Taylor of whom the defendant was executor, upon the 1st April, 1842. A summons issued upon the plaint in the usual form and was duly served upon the defendant, but it varied from the plaint, in describing the testator as William Thompson, instead of William Taylor. An objection being taken at the hearing on April the 14th, before the judge of the County Court, in respect of this variance, he dismissed the summons, but as the Statute of Limitations would otherwise bar the plaint, he gave the plaintiff leave to issue a fresh summons upon the original plaint, bearing the same date and number as the first summons. A rule had been obtained, calling upon the judge of the County Court to require the plaintiff to show cause why a writ of prohibition should not be granted to restrain further proceedings upon this summons, a writ which

The *Attorney-General*, for the judge of the County Court, *Udall*, for the plaintiff, now showed cause.—The plaint in this case was right, though the first summons was wrong. By the 1st ed. of *Practice for the County Courts in England*, the entry of a plaint is made the commencement of proceedings. (See I. II.) Such also is the effect of stat. 9 & 10 Vict. c. 95, which section enacts also that no misnomer or inaccurate description of any person or place in any plaint or summons shall vitiate the same, so that the person or place be therein described so as to be commonly known. In fact the summons is a mere warning to the party to appear. The plaint is analogous to the writ in an ordinary action, the summons to the copy of the writ or the declaration, and if the process be right the courts will always allow amendments in the copy of a writ or in a declaration. Rule X of the County Court Rules enables the judge, when any summons has not been served, in order to save the Statute of Limitations, to direct another summons or successive summonses to be issued bearing the same date and number as the first summons. The objection here made upon the ground of variance amounted to “No summons applicable to the plaint, and therefore in effect no summons at all, has been served on the defendant.” The summons having been served, Rule XII. expressly gives the judge power to do what he has done.

Horry, in support of the rule.—The stat. 9 & 10 Vict. c. 95, prohibits the plaintiff from giving evidence of any date or cause of action not stated in the summons. The whole of the Rules I. to XII. showing how service is to be effected, contemplates the issuing of only one summons except in the cases provided for by Rule XII. of the summons not having been served, and the Statute of Limitations being likely to bar a fresh summons. But in this case the summons has been served, and the defendant was bound to attend the court upon it or judgment might be gone against him as executor of Thompson. *Roberts v. B. A. & E.* 778.) shows that the court will not allow amendment where the effect would be to deprive a defendant of his rights. [ERLE, J.—Is there any obligation upon a man to

a summons out of the office within a given time? Suppose a writ is to be entered May 1st, and no summons to be taken out until June 1st, but then taken out dated May 1st, is there any objection to that mode of proceeding?] It does not appear that there is; but that was not the mode adopted here.

The summons is the commencement of the suit. It is by the writ shown to be by the County Court of Westminster. [LORD DENMAN, C. J.—The plaint does not show this. The summons is not required to issue within any specific period from the entry of the writ in the plaint. COLERIDGE, J.—The plaint must contain the substance of the action. PATTESON, J.—I remember arguing a case in which a copy of a writ had been served that differed from the writ itself, and the plaintiff was allowed to amend the copy.]

Udall referred to the cases of *Chalkley v. Carter* (4 Dow. P. C. 80); and *Thiggett v. Parker* (1 Bing. 65).

LORD DENMAN, C. J.—I regret this mistake, but we cannot help it. I should like to make the officer whose blunder it was pay the expenses, but we cannot interfere. The judge of the court below has rightly exercised the discretion vested in him by the 12th Rule of Practice.

PATTESON, J.—The first summons, which varied from the plaint and was dismissed for irregularity, was no summons at all. The only summons really issued upon the plaint was the second, and that, of course, according to Rule IV., was dated as of the day on which the plaint was entered.

COLERIDGE, J., and ERLE, J., concurred.

Rule discharged.

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BAIL COURT.

January 30, 1849.

(Before Mr. JUSTICE ERLE.)

STEVENSON v. SHICKLE.

Jurisdiction—Prohibition.

The Judge of the County Court has jurisdiction to enter upon the cause, and has jurisdiction to decide it. The want of jurisdiction, if existing at the commencement of the trial.

ASHLEY, on a former day, obtained a rule for a prohibition to the judge of the County Court of Cambridge, restraining him from proceeding further in this plaint, on the ground of a want of jurisdiction. The action was in trespass, brought against the defendant, who was an examiner of weights and measures,

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appointed under the 37 Geo. 3, c. 143, for entering the house the plaintiff without any lawful warrant, and seizing certain weights and measures. The present rule was obtained upon ground that the office of the defendant was a "franchise," within the meaning of the 9 & 10 Vict. c. 95, s. 58, which, coming necessarily in question in the action, the County Court had no jurisdiction to entertain the cause. It appeared, however, that at trial no question was raised as to the office of the defendant, that the point in dispute was, whether or not the defendant any right to enter the plaintiff's premises and make the seizure without a warrant. The verdict at the trial was for the plaintiff. *Wildman* showed cause.

Pashley, contra.

Cur. adv. vu

ERLE, J.—This was a motion for a rule absolute for a prohibition to the judge of the county court. It was a plain trespass for entering a house and taking away weights and measures. A justification was set up under a power conferred on the examiner appointed under the 37 Geo. c. 3. The justification was answered, on the ground that the examiner had no warrant from a magistrate, said to be necessary by 5 & 6 Will. 4, c. 63; judgment was given on that point, and for the plaintiff. It was clear that prohibition should not be granted for a supposed error in the judgment of the court, that the ground for a prohibition to restrain the County Court, on account of not having jurisdiction, ought to exist as much when the question was raised for adjudication as when the judgment was given. It was contended, first, that the appointment of an examiner was a franchise. It was, however, not necessary to advert to this point; it appears that the title to the appointment was not in question. The defendant was taken to be duly appointed, the validity of the appointment was distinct from the extent of the powers conferred. The question for adjudication related solely to that extent, and that depended upon the statute. The alleged ground for the prohibition, therefore, failed; and the rule must be discharged, but without costs.

Rule discharged

COURT OF COMMON PLEAS.

Trinity Term, 1848.

AUTEY v. HUTCHINSON.

Liability of clerk of a County Court.

*of a County Court gave orders for the fitting up of the court-
; for which an action was brought against him personally.
that neither his office, nor the subject-matter of the action, raised
a presumption that would exempt him from personal liability.*

It was an action of assumpsit for goods sold and delivered,
to defendant. At the trial before Maule, J. at the sit-
ting at Middlesex, it appeared that the defendant was clerk of
County Court of Barnet, and that the debt had been contracted
for the fitting up of the Court-house there, and leave was
given to the defendant to move for a rule to show cause why the
debt should not be entered for him, or why the plaintiff should
be nonsuited.

The Serjt., moved accordingly, citing the stat. 9 & 10 Vict.
and the following cases: *Unwin v. Wolseley* (1 T. R. 674);
Waldegrave (2 Moore, 621); *Horseley v. Bell* (Ambler,
Chitty on Pleading, 43. *Cur. adv. vult.*

The judgment of the court was now (June 10), delivered by
Maule, C. J.—This was an action brought to recover a demand
for wages and labour, in fitting up the County Court at Barnet, in
County of Hertford. The cause was tried, before my brother
Maule, at the sittings for Middlesex, in this term, when a verdict
was given for the plaintiff for the sum of 143*l.* The court was
then moved for a rule to show cause why a verdict should
not be entered for the defendant, or why a nonsuit should not be
granted pursuant to leave reserved. The motion was made upon
the ground, that it appeared from the plaintiff's evidence that the
defendant, at the time that he gave the orders for the work, was
clerk of the County Court, and that the work done was the
fitting up of the Court-house; and it was therefore insisted that
the defendant ought to be deemed to have given such orders as a
clerk, upon the credit of the treasurer of the court, or upon
that of the funds authorized to be raised by the act creating
the court; and that the case was within the principle of the deci-
sions in *Macheath v. Haldimand*, *Gidley v. Lord Palmerston*, *Myrtle*
v. East (1 East, 135), and several other cases, in which it was
held, that an action will not lie against a public agent for
work done by him in his public character or employment. We

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have referred to the judge's notes, and we think, upon perusal of the evidence, there is no ground for granting the rule. The defendant's situation was in no respects analogous to that of officers acting on behalf of a known department of the state in the discharge of duties incident to their public employment whose liability was the question in one class of the authorities referred to; nor does the case fall within the other class, in which it was held, that the terms and nature of the contract excluded the presumption of personal liability on the part of the individual giving the orders. The fitting up of the court formed no part of the duty of the clerk of the court, and it did not appear that he had the authority to contract upon the credit of any other person or of any fund already raised, or thereafter to be raised, under the authority of the act. The defendant might, when he gave the order, have excluded his personal liability, by intimating to the plaintiff whom else he was to trust, or to what fund he was to look for payment; but, as nothing of the kind passed, there was no ground for any legal presumption excluding the defendant's personal liability, and it necessarily became a question for the jury, as to whether the evidence was properly submitted to them; and, as the verdict was not impeached, supposing the case to have been properly submitted to them, there is no ground for granting the rule. *Rule refused.*

COURT OF QUEEN'S BENCH.

Trinity Term, 1848.

KEMP v. CLARK AND ANOTHER.

Local Court—Jurisdiction.

In the court of Kingston-upon-Hull, an action of assumpsit was brought, and the declaration stated that defendant was indebted to plaintiff within the jurisdiction of the court, for freight due and payable from defendant to plaintiff, for the carriage of goods from Marseilles to Kingston-upon-Hull, and there delivered to defendant within the jurisdiction aforesaid, at defendant's request.

Held, that the delivery was the consideration for the promise, and both the consideration and the cause of action were within the jurisdiction of the court.

THIS was a writ of error from the Mayor's Court of the City of Kingston-upon-Hull. The 1st count of the declaration stated that defendant on, &c. was indebted to the plaintiffs, within the jurisdiction of this court, in, &c. for certain freight due and payable from the defendant to the plaintiffs, for the carriage

of certain goods and merchandise by the plaintiffs before that time carried and conveyed in and on board of a certain ship called, &c., from Marseilles to the borough of Kingston-upon-Hull aforesaid, and there delivered to the defendant within the jurisdiction aforesaid, at his the said defendant's request. The point stated on behalf of the plaintiff in error was, that it appeared, from the 1st count of the declaration, that the cause of action did not arise within the jurisdiction of the said court of Kingston-upon-Hull.

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Hugh Hill, for the plaintiff in error, contended that the consideration must be laid within the jurisdiction: (*Winford v. Powell*, 2 Ld. Raym. 1310.) Here the delivery only is laid as within the jurisdiction. The contract was between the ship-owner and the shipper of the goods, and it does not appear that the freight was not payable by defendant as shipper. If the freight is not carried within the jurisdiction, the cause of action does not arise there.

Cleasby, for the defendant in error.—It is sufficient if the defendant took the bill of lading within the jurisdiction of the court; the delivery of the goods to the consignee is the consideration. Where that is in its nature *continuing*, the cause of action may arise within the jurisdiction, although the contract was made out of it. It is necessary that all the facts that go to make up the consideration should be within the jurisdiction: (*Emery v. Bartlett*, 2 Ld. Raym. 1555.)

Hugh Hill, in reply.—The cause of action is composed of the promise, the consideration, and the performance, and these must be within the jurisdiction of the court. The earning of the freight is a material part of the cause of action, and that was earned on delivery at the port of destination, and before delivery to the consignee.

Cur. adv. vult.

PATTESON, J., delivering the judgment of the court, said:—On reading the case of *Sanders v. Vanzeller* (4 Q. B. 260), and particularly with reference to the concluding paragraph in the judgment of Tindal, C. J., and the other cases on this subject, we are of opinion that the liability of a consignee or indorsee of a bill of lading to freight is a new contract, the consideration for which is the delivery of the goods to him at his request, and that the words in the declaration are to be applied to the delivery only; and that it sufficiently appears, by this declaration, that the delivery only was the consideration for the promise of the defendant; that delivery, and the request of the defendant, are stated to have been within the jurisdiction of the court below; and we are, therefore, of opinion that the cause of action, and the consideration, are well alleged to have been within the jurisdiction of that court. The judgment of the court below will, therefore, be affirmed.

Judgment affirmed.

COURT OF COMMON PLEAS.

Trinity Term, 1848.

SHIELDS v. RATE.

Jurisdiction—Suggestion.

A plaintiff who dwells more than twenty miles from the defendant may sue in the Superior Courts for a debt under 20l., even although he carries on business within that distance by means of an agent, who sells the very goods that were the subject of the action.

A RULE nisi had been obtained calling on the plaintiff to bring up the record in this action, that a suggestion might be entered to deprive the plaintiff of costs under the 11 & 12 Vict. c. lxxi. (the City of London Small Debts Act.) The action was tried before the Secondary of London, and a verdict for 3l. 16s. found for the plaintiff. It appeared, upon the affidavit in support of the rule, that the plaintiff carried on business at the Three Cranes Wharf, Upper Thames-street, in the City of London, within the jurisdiction of the City of London Small Debts Court, and within twenty miles from the defendant, who dwelt at 25, Moorgate-street, in the City of London, and that the goods, to recover the price of which the action was brought, were bought there.

Phinn showed cause.—The affidavit in support of the rule is defective; it does not state where the plaintiff dwells, or negative that he dwells more than twenty miles from the defendant. This omission is of itself sufficient to discharge the rule; but the plaintiff, in his affidavit, states that he resides in Scotland, and has not been in London during the last three years, and that he has got a cellar at the Three Cranes Wharf, where he carries on business. That being so, the sections of the act (ss. 40 and 112)(a) that are material, do not prevent the plaintiff suing in

(a) They are as follows:—Sect. 40. "And be it enacted, that such summons may issue, provided the defendant or one of the defendants shall dwell or carry on his business within the City of London or the liberties thereof at the time of the action brought, or provided the defendant or one of the defendants shall have dwelt or carried on his business therein at some time within six calendar months next before the time of the action brought, or if the cause of action arose therein."

Sect. 112. "And be it enacted, that all actions and proceedings which before the passing of this act might have been brought in any of Her Majesty's Superior Courts of Record, where the plaintiff dwells more than twenty miles from the defendant, or where any officer of the court holden under the provisions of this act, shall be a party, except in respect of any claim to any goods and chattels taken in execution of the process of the court, or the proceeds of value thereof, may be brought and determined in any such Superior Court, at the election of the party suing or proceeding, as if this act had not been passed."

erior Courts. There is a reason why a plaintiff, who more than twenty miles from the defendant, should not be ad to sue in the Small Debts Court, for the judge has a , summon the parties before him and examine them, and amount almost to a confiscation of small debts, if de- had the means of summoning plaintiffs into those courts ey lived in Scotland or a distant place. The words com- used in acts of Parliament of this nature, "seeking a d," &c., which have been interpreted by a series of , seem to have been purposely avoided in this act, and "dwell" used instead.

, in support of the rule, contended that, for the purposes act, the plaintiff might be considered to dwell within the ion of the Court by the agent who carried on his business. SWELL, J.—Could you contend that a man was alive on lay by his agent in that behalf? And how would you the word "dwells," in sect. 40?

e COURT.

Rule discharged.

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BAIL COURT.

Trinity Term, 1848.

(Before Mr. Justice WIGHTMAN.)

JEFFERIES v. BEART.

London Small Debts Act—Attorney.

The 49th section of the London Small Debts Act, 10 & 11 Vict. c. lxxi, abolishes the privileges of attorneys to be sued as defendants in their own courts.

AN action had been brought in one of the Superior Courts against the defendant, who was an attorney, and the plaintiff recovered 2l. 3s. 9d. Both plaintiff and defendant lived within the jurisdiction of the Sheriff's Court of London. A rule had been obtained to show cause why the record should not be brought into court, for the purpose of entering a suggestion to deprive the plaintiff of costs.

Bramwell showed cause.—The question turns on the construction of the 49th section of stat. 10 & 11 Vict. c. lxxi, which enacts, "that no privilege, except as hereinafter excepted, shall be allowed to any person to exempt him from the jurisdiction of the court." Does this deprive an attorney of his privilege to be sued in his own court? That is a privilege of the client and not of himself; it is an ancient privilege, and will not be taken away but by express words: (*Wells v. Trahern*, Will. 240; *Joliffe v. Langton*, 1 Ld. Raym. 342.)

WIGHTMAN, J.—Was not this question decided in *Jones v. Brown* (1 Cox & Macrae, 102)?

Bramwell.—No. There the question was whether attorneys are privileged as plaintiffs.

Ball, contra, was not called upon.

WIGHTMAN, J.—The plaintiff does not come within the exemption, for the judge has not certified. If it be desired to avoid this, there should be inserted in the writ of trial the words, "with liberty to the judge of the inferior court to certify." Or a judge of a Superior Court can certify. The language of the section cannot be evaded. It is too clear. The privilege is abolished.

Rule absolute.

BAIL COURT.

Michaelmas Term, 1848.

(Before PATTESON, J.)

GHISLIN v. DEAN.

Jurisdiction—Suggestion.

Advertisements were given at a newspaper office within the jurisdiction of the Westminster County Court, and the defendant also within the jurisdiction, but the newspaper was published within the city of London. The plaintiff brought his action for the charges of the advertisements, in the Superior Courts, and recovered 6l. 5s. To enter a suggestion to deprive him of costs was made absolute. The cause of action in such case arose wholly, or in some material point, within the jurisdiction of the County Court within which the defendant dwelt, or carried on his business, quære?

The plaintiff had obtained a rule, calling on the defendant to show cause why he should not bring in the record, in order that defendant might enter a suggestion to deprive him of costs. The plaintiff was proprietor of the *Satirist* newspaper, the office of which was at 10, Catherine-street, Strand, within the jurisdiction of the Westminster County Court. The defendant also resided within the county, and gave orders for certain advertisements at the office in Catherine-street. But the paper was printed and published in the city of London. The plaintiff brought an action in the County Court for the charge for the advertisements, and recovered 6l. 5s. The defendant thereupon moved for leave to enter a suggestion to the roll to deprive the plaintiff of costs, on the ground that the cause of action being given within the district of the Westminster County Court, and the defendant being resident there, the action ought to have been brought in that court.

The defendant showed cause, and contended that the cause of action arose wholly in Westminster. The advertisements were received at the office in Catherine-street, but the printing was in the city, and there the cause of action was done. The proper construction of the act was that by Baron Alderson, who said that the County Courts have jurisdiction, "if no material part of the cause of action arose out of the jurisdiction." (a) In *Nind v. Rhodes* (1 Cox & Macrae, 155),

²⁸th section is as follows:—"And be it enacted, that all actions and proceedings in the County Courts, the passing of this act might have been brought in any of Her Majesty's Superior Courts, where the plaintiff dwells more than twenty miles from the defendant, or where the cause of action did not arise wholly or in some material point within the jurisdiction

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it was held that bills of exchange were within the jurisdiction of the County Courts. The printing was within the city of Lorain. [PATTESON, J.—That is a material point.] Yes; and therefore the cause of action did not arise in some material point within the jurisdiction.

Lush, contra.—If the argument on the other side be that a tradesman having a manufactory in one district, and a shop in another at which he sold the goods made at the former, may evade the act, and sue in the Superior Courts, on the ground set forth by my friend. The section gives the party an option to sue in the Superior Courts, where the cause of action does arise in some material part in the County Court. But the material point of the cause of action *was* within the County Court. The order was given there, and without the order the cause of action is not complete. The true construction is, that where *no* part of the cause of action arose within the County Court, then a plaintiff is not bound to go there.

PATTESON, J.—According to *Butler v. Corney* (1 Cox & M. 141), I ought to grant the rule, for the purpose of enabling parties to raise this question upon the record, and then the construction of the statute would be opened to argument. I have entertained the doubt suggested by my brother Alderson, as to the meaning of the words, "when the cause of action did not wholly or in some material point within the jurisdiction;" an observation has certainly raised a question in my mind as to the construction. The rule for entering a suggestion must be absolute, that the question may be raised elsewhere. (b)

Rule absolute for entering a suggestion.

of the court within which the defendant dwells or carries on his business at the time the action brought, or where any officer of the County Court shall be a party, except in respect of any claim to any goods and chattels taken in execution of the process of the court, proceeds or value thereof, may be brought and determined in any such Superior Court of election of the party suing or proceeding, as if this act had not been passed."

(b) This case did not proceed further, so that the important question raised in it was then determined.

COURT OF COMMON PLEAS.

Michaelmas Term, 1848.

HAYTER AND ANOTHER v. FISH.

Suggestion—Costs.

order to obtain leave to have the record brought in for the purpose of entering a suggestion to deprive a plaintiff of costs, it is only necessary to show the court such reasonable ground for doing so, as will bring the case within the stat. 9 & 10 Vict. c. 95, ss. 128, 129. The rule in Butler v. Corney (1 Cox & Macrae, 141), affirmed. Here the affidavit of the defendant showed only where the plaintiff carried on business, but did not show where he resided, and also omitted to specify the particular County Court within which a material part of the cause of action arose, the court, nevertheless, although the affidavit was manifestly insufficient, made the rule absolute for the entry of a suggestion.

IMON showed cause against a rule obtained by *Byles*, Serjt., calling upon the plaintiffs to show cause why the record should be brought in and an entry thereon made to deprive the plaintiffs of costs in this action, and why they should not pay the costs of the application. The action was for goods sold and delivered; and at the trial, before the secondary, a verdict was given for the plaintiffs for 8*l.* 15*s.* The plaintiffs carried on business at 52, Ark-lane, in the city of London; and the defendant carried on business at Prince's-row, Pimlico, where the goods were delivered. The affidavit of defendant, on which this rule was moved, will best show the grounds of objection. After specifying the place where plaintiffs "carried on business," it runs thus: "And this deponent further saith, that before and at the time when this action was commenced, this deponent dwelt and carried on his business at Prince's-row, Pimlico, in the county of Middlesex, and that all the goods, amounting in value to 8*l.* 15*s.* were delivered by the said plaintiffs to this deponent at his said residence, Prince's-row, Pimlico, aforesaid; and that, at the time when this action was commenced, the above-named plaintiffs did not, nor did either of them, dwell more than twenty miles from this deponent; but on the contrary thereof, both of the said plaintiffs then did, and still do, dwell within twenty miles from this deponent, and that the cause of action arose, in a material point, within the jurisdiction of the court within which this deponent dwelt at the time when this action was commenced, and that the place where this deponent dwelt before and at the time when this action was commenced as aforesaid, and where he still dwells, and where the said goods were

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so delivered as aforesaid, was, at the time when this act commenced, and still is, within the jurisdiction of the Court of Middlesex, and that such court was opened and lished, and a plaint might have been entered in the said court the said sum of 8*l.* 15*s.* before and at the time when this was commenced." It is contended that the affidavit on which the rule was moved is insufficient, and therefore this rule should be discharged. The exceptions in the 128th section of the act have not been negatived as, to enable a party to take advantage of the provisions of the 129th section, with reference to costs, they have been. The affidavit—though it is true it states where the plaintiffs "carry on business"—does not show, as it should—where they reside. [MAULE, J.—Is it not stated in the affidavit that the plaintiffs do not dwell more than twenty miles from the defendant?] It is; but the objection is, that it is not shown where the plaintiffs reside. This, I apprehend, is fatal. The point is with regard to the concurrent jurisdiction of the said court. The affidavit states "that the cause of action arose at a material point, within the jurisdiction of the court within which the defendants dwelt, or carried on business at the time of being brought;" but it does not state what court, whether the Court of any other, and, for aught that appears, it may be within the jurisdiction of this court. By sections 2 and 3 of the act of 1846, His Majesty has power to subdivide the counties into districts. Now, in Middlesex there are not fewer than eleven districts, but the defendant does not show within which of these he resides, where the plaintiffs should have sued him. There has been appended to the rule the monstrous condition that the plaintiffs should pay the costs of this application. I had the hardihood to make a motion for a rule before Erle, J. in the Bail Court, which was refused. There is no case in the books in which the costs of an application as this has been granted. [COLTMAN, J.—] Is there an order in council for dividing the country into districts? There is; and a division has been made. [COLTMAN, J.—] Is that shown? The court will not take judicial notice of such divisions. That strengthens my position. The other side should have moved before the court the order in council, which they have not. On these grounds it is submitted that this rule should be discharged.

Byles, Serjt. in support of the rule.—The court, it is submitted, will not put as strict a construction upon affidavits of this kind as is now done, and used for such a purpose, as it would upon pleading, for instance, a plea in abatement. It has been held, in the Court of Exchequer, that if a *prima facie* case for entering the suggestion is made out, it is enough: (*Butler v. Corney*, 1 Cox and Macrae, 100. All we had to do was, to make out a *prima facie* case, and that has been done. If attention be given to sects. 128 and 129 of the act, it will be found that the very language of the statute has been followed in this affidavit. With regard to the objection that the plaintiff did not state the district court within which the defendant dwelt, and the court where the action arose, is not set forth, it is contended that the statement

affidavit that the place where the defendant dwelt, and where goods were delivered, was within the jurisdiction of the County of Middlesex, is sufficient. In sects. 2, 3, and 23, these are styled "County Courts;" besides, the name is that by which they are properly known. (He was then stopped by the clerk.)

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The COURT said, that on the authority of the case of *Butler v. Hayter*, the defendant had made out enough to enable him to enter his suggestion. For this purpose nothing more is necessary than to show to the court such reasonable ground as would warrant it to order the record to be given up to the party applying to the suggestion, and in the present case the defendant had already done that. No order would be made as to costs, as the court might, if they please, traverse the suggestion, and then the matter would abide the result.

Rule absolute.

COURT OF QUEEN'S BENCH.

Michaelmas Term, 1848.

REG. v. EADY.

Quo warranto—Clerk of County Court.

In 1846, A. was performing the duties of clerk under a *Small Debts Act*, included in Schedule B. of 9 & 10 Vict. c. 95, as deputy clerk, his father, who had been regularly appointed clerk, but was, in consequence of illness, unable to discharge the duties:

That A. was not entitled, under sect. 34 of that act, to be the first clerk of the same Court when holden as a County Court under that section not applying to a person who merely performed the duties as deputy for another, but only to persons who were either clerks *de jure* or *de facto* of the old Court.

It was submitted in the rule nisi for a *quo warranto*, that "the defendant is not entitled, and that the relator is," is not a sufficient compliance with the rule of Court: (*H. T. 7 & 8 Geo. 4.*)

A RULE had been obtained, calling upon Mr. Eady to show cause why an information in the nature of a *quo warranto* should not be filed, requiring him to show by what authority he exercised the office of clerk to the County Court of Staffordshire. In support of the affidavit of Mr. Bishop, the relator, it appeared that, under the *Small Debts Act* for the Staffordshire Potteries was passed in 1845, and that his father was duly appointed clerk of the Court under that act; in June, 1845, the father, being attacked with illness, was appointed, with the consent of the judge, the deponent,

REG. v. EADY. who was in partnership with him, to act as his deputy; and deponent continued to do so, and performed all the duties; and shared the emoluments of the office until June, 1846.

—*Clerk of
County Court*
—*Quo
warranto.*

The only statement of objections to Mr. Eady's title contained in the rule nisi was, "that Mr. Eady is not entitled, and Mr. Bishop is."

The *Attorney-General*, *Welsby*, and *L. Temple*, showed cause. 1. The rule of Court (H. T. 7 & 8 Geo. 4; 6 B. & C. 267) is complied with by this rule, which, in truth, specifies no objection to the title of the defendant: (*Watson on Awards*, 275.)

LORD DENMAN, C. J.—Why could not such an objection be taken at once, before any preparation has been made for arguing the case upon the merits? It might just as well be taken a day after the rule was obtained, as later.

The *Attorney-General*.—It has not been the practice to do so, though it might be very convenient to lay down such a rule. Secondly, there is no ground for this application. Mr. Bishop claims a right to this office under sect. 34 of 9 & 10 Vict. c. 1 because he was performing the duties of clerk to the old court on the 1st of June, 1846; but that section does not apply to his case, as his father was the clerk of the court, and he only performed the duties as his father's deputy; the section applies only to persons who were either *de jure* or *de facto* clerks, either regularly appointed or acting without regular appointment.

Sir *F. Thesiger*, Q.C., and Sir *John Bayley*, contra.—First, the rule is sufficient. It states the objection; and the reasons are not required to be stated. [LORD DENMAN, C. J.—But, on the main point, we are inclined to agree with the *Attorney-General*. Then, secondly, the words of the clause are quite clear, "that the persons holding the offices or performing the duties of clerk &c., in any court, &c., on the first of June, &c., shall be entitled, if not disqualified under this act, to be the first clerks of the said court, when holden as a County Court under this act." [WIGGAMAN, J.—What becomes of the father? He held the office.] He is excluded, because he was not performing the duties. [WIGGAMAN, J.—The statute says, that the holder of the office, whether or not qualified, shall be entitled.] That refers to the qualification clause: (s. 24.) [ERLE, J.—If the son had been appointed, and the father had applied for a *quo warranto*, might he not have said that he executed the office by his son?] Perhaps an appointment either of the father or the son would have been good, but certainly one of them ought to have been appointed. The necessity was sought to be avoided by allowing an interval of a day between the order abolishing the old court and that establishing the new, the 34th section requiring that the party should continue to hold the office, or to perform the duties at the time when the old act was repealed; but whether that attempt has been effectual is not the question now raised.

LORD DENMAN, C. J.—There is nothing at all in this point. The son performed the duties of the office, but only as deputy for

ier. The principal continued to hold the office, and when the case, it is plain that he is the person contemplated by use. The words were clearly intended to meet the case of n who, though not possessing the qualification required by tute, held the office, or, if nobody was in the office, per- its duties.

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BRIDGE, J.—I am of the same opinion. Here the relator son, and he must bring himself within the words of the use. As to holding the office, he cannot be said to have at all; the father was the holder of the office. Then, was rming the duties? In a certain sense he was, but only as er's deputy; and sect. 26 provides for a deputy in the case s. At all events, as good a case may be made for the s for the son; and having reference to the words of the I cannot see upon what ground the father is disentitled.

ATMAN, J.—I think that the intention of the Legislature ed by adopting the suggestion of my lord. The clause will , several persons. It may mean a person actually holding e, both *de facto* and *de jure* clerk, or a person who per- ie duties, the office itself being vacant,—or a person who, disqualified under sect. 20, holds the office and performs es by deputy, for the latter would fulfil all the terms of use. In this case there was certainly nothing to exclude er.

;, J.—I am of the same opinion. It appears to me that can claim under the second alternative, as having per- the duties, if there is any person who, under the first, can to hold the office.

DENMAN, C. J.—I should add that the statement of the n in the rule appears to us quite insufficient.

Rule discharged, with costs. (a)

following is the clause referred to:—Sect. 34. "Provided always, and be it enacted, vons holding the offices or performing the duties of clerks and high bailiffs in any court r any act cited in either of the said schedules (A) and (B) on the 1st day of June in nd who shall continue respectively to hold the same offices or to perform the same e time when such act shall be repealed under the provisions of this act, whether or d as hereinbefore provided, shall be entitled, if not disqualified under this act, to be rks and high bailiffs of the same court when holden as a County Court under this all continue to execute their several offices, subject to the power of removal provided except that the clerks and high bailiffs already appointed to any court named in le (A) shall be removeable only for such cause as would have warranted their der the acts according to which their court is now holden; and where, under the f any of the said acts, more than one clerk was on the said 1st day of June, and shall ch act shall be repealed, under the provisions of this act, acting in and for any of erts, or in and for any district or division of any court, the same persons shall jointly office of clerk of the same court as aforesaid, under such regulations as to the the duties and emoluments of the said office as shall be from time to time made by ert, in case of difference between them: Provided always, that if the clerk of any in the said schedule (A) shall, within one calendar month next after the repeal of er which it is now holden, decline to accept the office of clerk to the same court as r this act, it shall be lawful to the Commissioners of her Majesty's Treasury, if they fit, to take into consideration the special circumstances of each case, and to award nsation to be paid to such clerk as under the circumstances they shall think n the manner herein provided in the case of persons whose emoluments will be r taken away by this act."

COURT OF COMMON PLEAS.

Michaelmas Term, 1848.

BARNETT v. COLSON.

Suggestion—Practice.

On an application for leave to enter a suggestion, to deprive the plaintiff of costs, where the affidavit did not state in terms that the defendant resided within twenty miles of the plaintiff, the court discharged the rule with costs.

PATERSON showed cause against a rule *nisi* which had obtained by *Ball*, for leave to enter a suggestion on the ground that the plaintiff was to be deprived of costs. The action was in *debt* for 5*l.* 7*s.* 6*d.* Verdict for the plaintiff. The affidavit, it was objected, did not negative the exceptions in the 128th section of the act, which gave concurrent jurisdiction to the Superior Courts. It does not state that the defendant dwelt less than twenty miles from the plaintiff or that the cause of action arose wholly or in some material part within the jurisdiction of the court within which the defendant dwelt or carried on business at the time of action brought: (*1 v. Robson*, 1 Cox & Macrae, 122.)

Ball, in support of the rule.—The affidavit states that the defendant resided in Archway-road, Upper Holloway, and the plaintiff resided in Basinghall-street. [MAULE, J.—Is it stated that the defendant resided within twenty miles of the plaintiff at the time of action brought.] That certainly does not appear. The defendant shows that he was liable to be summoned in Clerkenwell County Court.

By the COURT.—The omission of a material requisite from the affidavit, such as this, is fatal.

Rule discharged, with costs.

COURT OF EXCHEQUER.

Michaelmas Term, 1848.

BROOKER v. COOPER.

Suggestion—Practice.

to obtain leave to enter a suggestion on the record to deprive plaintiff of costs under the County Courts Act, the defendant must positively negative that the plaintiff is within any of the exceptions in 128th section; and in negating the fact that the defendant resides within twenty miles of the plaintiff, it is not sufficient to say that he is within a short distance, and within the jurisdiction of the County Court.

the court cannot order judgment for the plaintiff, without costs, to be entered under the 129th section, without a suggestion on the record. (a)

LYER showed cause.

Lurlstone had, on a former day, obtained a rule, calling on the plaintiff to show cause why he should not bring in the record, and if judgment should not be entered up thereon for 6l. 6s. 6d. paying the amount of the verdict recovered in this action, or if the defendant should not be at liberty to enter a suggestion on the record to deprive the plaintiff of costs, pursuant to the statute, &c. The rule had been obtained on an affidavit of defendant, which stated that the action was brought to recover 6l. 6s. 6d. for goods delivered to him by the plaintiff, and that plaintiff, on the day of the cause before the sheriff of Surrey, recovered a verdict for the sum, and no more. That defendant, at the time of the commencement of this suit, resided and dwelt, and still resides and

sections referred to, 128 and 129, are as follows:—Sect. 128. "And be it enacted, that all actions and proceedings which before the passing of this act might have been brought in any of Her Majesty's Superior Courts of Record, where the plaintiff dwells more than twenty miles from the defendant, or where the cause of action did not arise wholly or in some material part within the jurisdiction of the court within which the defendant dwells or carries on his business at the time of the action brought, or where any officer of the County Court shall be a party in respect of any claim to any goods and chattels taken in execution of the process of the court, or the proceeds or value thereof, may be brought and determined in any such court, at the election of the party suing or proceeding, as if this act had not been

enacted. "And be it enacted, that if any action shall be commenced after the passing of this act in any of Her Majesty's Superior Courts of Record, for any cause other than those before specified, for which a plaintiff might have been entered in any court holden by the county court, and a verdict shall be found for the plaintiff for a sum less than twenty pounds, if the action is founded on contract, or less than five pounds if it be founded on tort, the court shall have judgment to recover such sum only, and no costs; and if a verdict shall be found for the plaintiff, the defendant shall be entitled to his costs as between attorney and client, unless in either case the judge who shall try the cause shall certify on the back of the writ that the action was fit to be brought in such Superior Court."

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dwells at No. 2, Elizabeth-street, &c., in the county of Surrey,—that the plaintiff, at the time of the commencement of this suit, and still does, carry on his trade and business of a builder, within a short distance of the residence of the defendant, namely, W. in the said county of Surrey, and that the plaintiff's cause of action arose in W., in the said county of Surrey, within the jurisdiction of the Camberwell County Court for Surrey, at, &c. in the said county, and not elsewhere, and that the residence of the defendant is within the jurisdiction of the said County Court. The defendant's affidavit is not sufficient; it does not state that the plaintiff was bound to bring his action in the County Court. By the 128th section of the County Courts Act, it is necessary to negative three exceptions, and this he has not done. The following is the form of the affidavit:—"The deponent states that the action was brought to recover the sum of 6*l.* 6*s.* for goods sold and delivered by the plaintiff to the defendant, and that the plaintiff, on the trial of the cause before the sheriff of the county of Surrey, recovered a verdict for 6*l.* 6*s.* and no more; that the deponent, at the time of the commencement of the suit, resided and dwelt, and still does reside and dwell, at No. 2, Elizabeth-street aforesaid; and that the plaintiff, at the time of the commencement of the suit, carried on his trade and business of a builder, *within a short distance of the residence of this deponent, namely, on Walcorth-common, in the said county of Surrey*, and still does so; that the plaintiff's cause of action arose in Walworth, in the said county of Surrey, within the jurisdiction of the Camberwell County Court of Surrey, held at Denmark-hill, in the said county, and not elsewhere." The affidavit then goes on to negative the fact that an officer of the court is a party, &c. The affidavit does not state that the plaintiff dwells within twenty miles from the defendant; it should show affirmatively that the case is not within any of the exceptions mentioned in the 129th section of the 9 & 10 Vict. c. 95, which enacts "that all actions which before the passing of this act might have been brought in any of His Majesty's Superior Courts of Record, where the plaintiff dwells more than twenty miles from the defendant, or where the cause of action did not arise wholly or in some material point within the jurisdiction of the court within which the defendant dwells, or where he carries on his business, at the time of the action brought, or where any officer of the County Court shall be a party, except in respect of any claim to any goods and chattels taken in execution of the process of the court, or the proceeds or value thereof, may be brought and determined in any such Superior Court, at the election of the party suing or proceeding, as if this act had not been passed." This point has been decided in *Meeten v. Nichols* (1 Cox & Macrae, 123.) And this court has decided the same point in *Butler v. Corney* (1 Cox & Macrae, 141.) This affidavit is, therefore, defective, in not negating the fact that the defendant resides within twenty miles from the plaintiff, but merely that he resides a short distance from the plaintiff, viz. on Walworth-

on; the court cannot judicially notice whether or not that is twenty miles.

Idone, in support of the rule.—The rule itself consists of two parts: first, it calls on the plaintiff to show cause why judgment should not be entered up for the amount of the debt, without costs, and in the alternative, why there should not be a suggestion entered upon the record to deprive the plaintiff of costs. Even though the application is not sufficient to entitle the defendant to a suggestion, still he is entitled to the first branch, to judgment for the debt without the costs. The cases cited simply applications to enter a suggestion. [PARKE, B.—You have a suggestion, in order to deprive the plaintiff of costs.] The language of this act is different from former acts; it is sufficient in these sections, if it appear that the action might have been brought in the County Court. The 128th section gives the County Courts a jurisdiction in certain cases. Then comes the next section: “If any action shall be commenced after the passing of this act in any of Her Majesty’s Superior Courts of Record, for any other than those lastly hereinbefore specified, for which judgment might have been entered in any court holden under this act, the said plaintiff shall have judgment to recover such sum, and no costs,” unless the judge shall certify on the back of the record. I contend that it is sufficient for me if it appear that a *plaint might have been entered* in the County Court, and in my affidavit it does so appear, because it is distinctly stated that the action arose within the jurisdiction of the County Court, and that the plaintiff dwelt within the jurisdiction. The affidavit therefore, that he might have sued in the County Court, and the onus is cast on him of showing that he is within the ex-

Under the late statutes it was necessary that the courts should ascertain particular facts in order that the party should be entitled to judgment of costs; here it is quite sufficient if it appear that a *plaint might have been entered* in the County Court. [PARKE, B.—There must be some reason on the record why the statute of judgment should be departed from, why the plaintiff does not get his judgment. You must bring your case within the 129th section, the effect of which are, “for any other cause than those lastly hereinbefore specified.” Your affidavit ought to show that it was not for any other cause before specified, and that it was one in which a *plaint might have been entered* in a court under the statute. You must bring yourself within the words which deprive the plaintiff of costs; that is the decision in the Common Pleas, following this court.] But those were cases simply to enter a suggestion. [PARKE, B.—It is the same thing. You cannot get out a suggestion. If there is any reason for departing from the statute of Gloster, it must appear on the record. In *Watson v. Watkin* (11 M. & W. 760), it is settled that you must have a suggestion in order to deprive a party of costs which he is entitled to under the general statute law; and if that suggestion is of matters of fact, must, like all other matters of fact, be tried by a jury if it

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is traversed.] By the 129th section the court is to give judgment for the debt only, unless the judge should certify. The fact that the judge not certifying need not be negatived; why should other exceptions?

PARKE, B.—This rule must be discharged. A distinction has been sought to be made between its two branches, but it is not given. The rule long since adopted by the courts is, that whenever a Statute of Gloster, which gives a successful party his costs departed from, the reason of that departure must be made to appear by suggestion on the record, that the opposite party may have an opportunity of traversing it, but when the alteration to be made merely increases or diminishes the *amount* of the plaintiff's costs, such a course is unnecessary. But when a suggestion is entered it is an allegation of matter of fact, which must be determined by jury, as was shown in *Watson v. Quilter* (11 Mees. & Wel. 76) where a full review of the whole doctrine of suggestion will be found. In the present case, therefore, unless the County Courts Act has otherwise directed, you cannot enter judgment for the plaintiff for his debt alone, without suggesting on the record that he is deprived of costs. But the statute contains no direction to this. That part of the 129th section which relates to it is no proviso, but an enacting clause: "If any action shall be commenced in any of Her Majesty's Superior Courts of Record for any cause other than those lastly hereinbefore specified," that is to say, named in the 128th section, so that the 129th section is to be read as if the 128th section were incorporated with it, and therefore to avail yourself of the enactment, you must negative, by your affidavit, all the cases of exception enumerated in the 128th section. *Meeten v. Nicholls*, and *Butler v. Coney*, the Court of Common Pleas has already so decided. Nor is *Nind v. Rhodes* inconsistent with those decisions, for the costs are taxed on the *postea*, and a certificate of the judge is required to be on the back of the record, which is supposed to be in court, and would speak for itself, that an affidavit is unnecessary.

The rest of the court concurred.

Rule discharged, with costs.

COURT OF EXCHEQUER.

Michaelmas Term, 1848.

BOWEN v. EVANS.

Practice—Replevin—Certiorari.

action for a writ of certiorari, in order to remove a replevin under the 9 & 10 Vict. c. 95, s. 121, from a County Court into the Superior Courts at Westminster, should be to a judge at s in the first instance, and not to the court.

I moved, on behalf of the plaintiff, for a rule to show why a writ of *certiorari* should not issue, for the purpose of removing the proceedings in replevin from the County Court of Essex into this court; he produced an affidavit, stating that a dispute of law was likely to arise in respect of the land upon which a distress had been taken, and submitted, therefore, under 9 Vict. c. 95, s. 121, (a) he was entitled to have the action

B.—Why not make all applications of this kind to a judge at chambers?

K. C. B.—It is most desirable that economy should be observed in the proceedings of this sort; and as it may be as well done by applying for a summons, and attending at chambers for an order, as to me to be the proper course to be pursued, and is, I think, the mode ordinarily adopted.

SON, B.—It is always the practice to apply by summons for a writ at chambers in such a case, and is a saving of great expense to the parties. The judge may refer it to the court, should a dispute of law arise, but that is quite another matter.

Rule refused.

The action is as follows:—Sect. 121. "And be it enacted, that in case either party to an action of replevin shall declare to the court in which such action shall be brought that the thing so replevined is or is not a corporeal or incorporeal hereditament, or to any toll, market, fair, or other franchise, or that the rent or damage in respect of which the distress shall have been taken is more than the sum of twenty pounds, and shall become bound, with two sufficient sureties approved by the clerk of the court, in such sums as to the judge shall seem reasonable, and being had to the nature of the claim, and the alleged value or amount of the thing so replevined, to prosecute the suit with effect and without delay before the court by which such suit shall be tried that such title as afore-mentioned is or is not in dispute, or that there was ground for believing that the said thing so replevined was more than twenty pounds, then, and not otherwise, the action may be tried by any court competent to try the same in such manner as hath been accustomed."

COURT OF EXCHEQUER.

Hilary Term, 1850.

WOOD v. PERRY.

Jurisdiction—Cause of Action—Costs.

The court having determined, in Grimbley v. Aykroyd (1 Cox & Macrae 79), that the whole of a tradesman's bill constitutes one cause of action within the 63rd section of the County Courts Act, if any one of the bill arises within the jurisdiction of the County Court, cause of action arises, in some material point, within that jurisdiction under the 128th section.

Where the plaintiff, a tailor, dwelt and carried on business within the district of the County Court of Clerkenwell, and within twenty miles of the defendant, who dwelt within the district of the County Court of Brompton, but carried on his business within the district of the County Court of Westminster, and all the work had been done at the plaintiff's residence, and as to three items in the particulars, the orders were given, and the goods delivered at the residence of the defendant; as to ten other items, the orders were given and the goods delivered at plaintiff's place of business, and in one instance the order was given and the goods were delivered at the residence of the plaintiff.

Held, that there was no concurrent jurisdiction of the Superior Court with the County Court, to entertain the suit under the 128th section, and therefore the plaintiff, who had sued in the Superior Court, was not entitled to the costs of suit.

THIS was an action to recover less than 20*l.* for a tailor's bill. *Baddeley* had, in the previous term, obtained a rule to show cause why the plaintiff should not bring in the record, in order to enable the defendant to enter a suggestion to deprive him of costs. *Watson* now showed cause, and cited *Grimbley v. Aykroyd* (1 Cox & Macrae, 79), *Butler v. Coney* (1*b.* 141), *Hughes v. Lenny* (5 M. & W. 183), *Wimbush v. Talbois* (How, 59), as to the construction of the statutes. *Cur. adv. vult.*

The judgment of the court was now delivered by

ALDERSON, B.—This was an application to the court for a rule that the plaintiff should have judgment for his debt recovered in this cause, without costs, on the ground that he had sued in the court although the cause of action had arisen, wholly or in some material point, within the jurisdiction of the Small Debts Court of Brompton, within which jurisdiction the defendant was resident.

The question originally came in the Long Vacation before me at chambers, when I ordered the further proceedings, on payment

but to the plaintiff, to be stayed till the fourth day of
as Term.

facts of the case as they appear on the affidavits are these:—
The plaintiff was a tailor, who resided and carried on his business
in Pentonville, Islington, within the jurisdiction of the
Middlesex County Court. The defendant was a hair-dresser and
residing within the jurisdiction of the Brompton County
Court and carrying on his business at the Burlington-arcade,
within the jurisdiction of the Westminster County Court. The
demand is for the amount of a bill containing various
clothes made for and supplied to the defendant. As to
the items of the plaintiff's bill, the orders for them were
for the goods delivered at the defendant's residence, within
the Brompton jurisdiction, and the work done at the plaintiff's

As to ten other items the orders were given, and the
goods delivered, at the Burlington-arcade, and the work done at
the plaintiff's residence. And in one case both the order was given
for work done and goods delivered at the plaintiff's residence.
The question then is, whether, under the 128th section of the
Act of 1846, c. 95, this court had a concurrent jurisdiction in this
case. Here the plaintiff dwells within twenty miles of the
court, and the question is, whether the cause of action arose,
in some material point, within the jurisdiction of the
court of Brompton, where the defendant resided, or of
Islington, where he carried on his business when this action
was brought.

It is clear that if each of the items is to be treated as con-
stituting a separate cause of action, one whole cause of action arose
under the jurisdiction, and then it would seem to follow that
the Brompton Court was the only court in which the whole demand
could be recovered in one action.

We think this must be determined in conformity with the
rule laid down by this court in *Grimbley v. Aykroyd* (1 Cox &
19.) We there laid it down that where a tradesman has
sued a party for any amount in which the items are so
connected together that it appears that the dealing is not intended
to be done with one contract, but to be continuous, so that one
item paid, shall be united with another and form one con-
tinuous demand, the whole together form but one cause of action,
and cannot be divided. In other words, we held that the words
"cause of action" in this act of Parliament meant "cause of one
action" and were not to be limited to an action upon one separate
item.

Now here the items in this bill are thus connected to-
gether that the whole bill forms one cause of action. Then, if so,
that it is a cause of action not wholly occurring within the
jurisdiction of the County Court either of Brompton or of
Islington, for a part of it occurs within the jurisdiction of
Middlesex, where the defendant neither resides nor carries on
business. But does it arise in some material point within the
jurisdiction, or either of them? We think it does, and

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we are disposed to determine the question by laying down some definite rule which may be easily acted upon, and to hold that if any one item arises within the jurisdiction of a County Court in such a bill as this, the cause of action in some material point arises within that jurisdiction. In this case, therefore, as the Superior Court has no concurrent jurisdiction under the 128th section, the case falls within the 129th section of the act, and this rule must be made absolute.

Rule absolute.

COURT OF EXCHEQUER.

Hilary Term, 1849.

SMITH v. ROBERTS.

Suggestion—Practice—Costs.

In order to enter a suggestion on the roll to deprive the plaintiff of costs after judgment, there must be a previous application to set aside the judgment, if signed. If there be a judgment entered on the record, an application merely to enter a suggestion cannot be granted.

Whether the provisions of sect. 129 are applicable to the case of a judgment by default,—quære?

THIS was a rule to enter a suggestion to deprive the plaintiff of costs under the 129th section of the County Courts Act. The action had been of trespass; the defendant had suffered judgment by default, a writ of inquiry had been executed, and the damages assessed at 1s., the under-sheriff certifying, under 3 & 4 Vict. c. 24, that the trespass was wilful and malicious.

Bovill showed cause, contending that an application for a suggestion could not be entertained while the judgment stands; the defendant should first move to set aside the one existing: (*Soames v. Cooper*, 18 L. J. N. S. Exc. 38, and *Godson v. Lloyd*, 4 Dow. 157.)

Hawkins, contra.—The judgment cannot be impeached till the suggestion is placed on the record, and if that suggestion be not traversed, the judgment may be amended. If the court should ultimately decide in favour of the plaintiff, there will be no necessity for allowing the record: (*Bond v. Bailey*, 3 Dow. 808.) In *Soames v. Cooper* the point was not fully argued.

POLLOCK, C.B.—In *Bond v. Bailey* the only point really decided was, that the application for a suggestion was not too late when made in the term following the trial. Here the question is as to the form of the application, whether you must not *first* move to set

de the judgment and execution, inasmuch as the entry of a suggestion would be nonsense on a record containing an entry of judgment for debt and costs taxed.

Hawkins.—The point was raised and so decided in *Baddeley v. Oliver* (Dow. 598), and in *Brook v. Tidy* (10 Jur. 967), a rule had been obtained for a new trial in a cause before the sheriff, on which judgment had been signed, and it was held not to be necessary to make any reference to the judgment.

POLLOCK, C. B.—This rule must be discharged. In *Baddeley v. Oliver* it does not appear distinctly that the rule might not have been set aside the judgment, and enter a suggestion. But even if not so, *Soames v. Cooper* is directly the other way, and a decision of the court which we should not overrule.

PARKE, B.—It is an old-established rule of practice that if, after judgment signed, you want to set aside some prior step, you must first move to set aside the judgment.

The rest of the court concurred.

Hawkins applied that the rule be discharged with costs.

ALDERSON, B.—This case raises another point which must some day be decided, whether the 129th section of the County Courts Act applies at all to the case of a judgment by default.^(a) It appears to contemplate only a case where there is a verdict for a plaintiff or defendant in which the judge could grant a certificate.

PARKE, B.—It is also a question whether you could have your costs at all, as coming within the County Courts Act. The rule must be

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Suggestion—
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Costs.

Discharged with costs.

(a) The section is as follows:—Sect. 129. "And be it enacted, that if any action shall be commenced after the passing of this act in any of Her Majesty's Superior Courts of Record, in any cause other than those lastly hereinbefore specified, for which a plaintiff might have entered in any court holden under this act, and a verdict shall be found for the plaintiff for a sum less than twenty pounds, if the said action is founded on contract, or less than five pounds if it be founded on tort, the said plaintiff shall have judgment to recover such sum only, and no costs; and if a verdict shall not be found for the plaintiff, the defendant shall be added to his costs as between attorney and client, unless in either case the judge who shall try the cause shall certify on the back of the record that the action was fit to be brought in such Superior Court."

COURT OF EXCHEQUER.

Hilary Term, 1849.

VICARS v. MOULD.

Suggestion—Practice.

If the defendant is unable to ascertain whether judgment has been signed, so as to enable him to apply for leave to enter a suggestion, the court will grant a rule to set the judgment aside, if entered, &c.

JOYCE moved for leave to enter a suggestion to deprive plaintiff of costs. It had been decided in *Smith v. R* (1 Cox & Macrae, 210), that a suggestion cannot be applied for without moving to set aside the judgment. In this case the defendant was unable to ascertain whether judgment had been signed, a case was tried under a writ of trial only returnable two days. He asked, therefore, for a rule to show cause why the judgment if entered up, should not be set aside and a suggestion entered. The COURT granted the rule in that form.

COURT OF EXCHEQUER.

Hilary Term, 1849.

MOORE v. WALDRON.

Suggestion—Practice.

In order to enter a suggestion to deprive a plaintiff of costs under County Courts Act, where judgment is already signed, the motion must be to set aside the judgment as well as to enter a suggestion.

GRAY showed cause against a rule obtained by *W. Cole*, calling upon plaintiff to show cause why he should not bring record into court, in order that the defendant might enter a suggestion to deprive plaintiff of costs. The first objection is, the motion ought first to be to set aside the judgment, as this case has already decided.

W. Cole.—In the cases already decided there does not appear any fact that exists in this case, viz., that this being a writ of trial the judgment was signed within four days after the trial, and before we could come to this court.

PARKE, B.—It is only necessary in these cases, where you appear having had no opportunity to set aside the judgment, to apply to set aside the judgment, as well as to enter a suggestion.

Discharged with cost

COURT OF COMMON PLEAS.

Hilary Term, 1849.

DODD v. WIGLEY.

Suggestion—Affidavit.

on which was founded a motion for a rule for a suggestion the plaintiff of his costs under the County Courts Act, stated cause of action arose, in some material point, within the n of the Westminster County Court, in which the defendant l carries on business, and that the goods, except to the amount ere delivered to the defendant at the Union Club-house, ithin the jurisdiction of the Westminster County Court, and ce where, before and at the commencement of this suit, the was and is employed, and dwells and carries on his business, eithier the said plaintiff nor the defendant is an officer of the minster County Court, nor was any officer of the said County arty concerned in the matter in question in this cause."

sufficient, inasmuch as it did not show that defendant "dwelt" ed on" his business, at the time of the action brought, within iction of the Westminster County Court.

nsufficient, also, because it stated that neither plaintiff nor is an officer of the Court, whereas it should have stated r of them was an officer at the time of the action brought.

e 128th sect. of the County Courts Act, enabling an action ught in the Superior Courts, "when the cause of action did wholly or in some material point within the jurisdiction of the re the plaintiff dwells or carries on his business at the time on brought," is not that "if no material part of the cause of ses out of the jurisdiction," and, not as generally read, "if ial part arises within it."

mer day a rule had been obtained by Joyce calling on plaintiff to show cause why the judgment in this action be set aside, and why the plaintiff should not bring in for the defendant to enter a suggestion thereon to : plaintiff of costs.

on was tried before the Secondary of the City of Lon- a verdict was found for the plaintiff, damages 2l. 10s. as obtained on the ground that the cause of action being under 20l. might have been tried in the Westminster ourt.

r. F., now showed cause against the rule.—He submitted, the affidavit stating this action to have been one ht have been tried in the Westminster County Court, ive in two respects, in not sufficiently negating the

r. m—
vii. second and third exceptions contained in the 128th section County Courts Act (9 & 10 Vict. c. 95.) The affidavit state with sufficient explicitness that the cause of action wholly or in some material point within the jurisdiction court within which the defendant dwelt or carried on his business at the time of the action brought," the affidavit states "before and at the time of the commencement of the action brought, the defendant was and is employed, dwells, and on his business" within the jurisdiction of the Westminster County Court. The next defect was, that the affidavit did not state negatively that neither of the parties to the suit was an officer of the County Court at the time of the action brought, the affidavit stating "that neither the plaintiff nor the defendant is an officer of the County Court of Middlesex, nor was any officer of said court directly or indirectly interested in the matter in dispute." It was necessary to state negatively that they were not officers of any County Court at the time the action was brought: (*v. Broughall*, 1 Cox & Macrae, 125, and *Meetan v. Nicholls & Macrae*, 123.) The learned counsel then proceeded to state that the true construction of the words enabling an action to be brought in the Superior Courts, "where the cause of action arises wholly or in some material point within the jurisdiction of the Court within which the defendant dwells or carries on his business at the time of the action brought," was, that the action arose in some material point out of the jurisdiction of the court in which the plaintiff dwelt. In *Butler v. Coney* (1 Cox & Macrae, 125) the same point arose incidentally, and there Mr. Baron is reported to have said, "Is not the meaning of the 128th section that the Superior Court shall not have concurrent jurisdiction when any material part of the cause of action arises within the jurisdiction of the County Court? The section is so worded, and I am not certain that it does not mean 'if any part of the cause of action arises out of the jurisdiction of the County Court,' as I at first thought, 'if any material part of the cause of action arises within it.'"

MAULE, J.—Take the common case of goods delivered within the jurisdiction, and the order given without the jurisdiction. There the whole cause of action would arise on a contract made within the jurisdiction. Would the vendor, suing in the County Court, be entitled to his costs? Yes; but the plaintiff is stronger still; for he is a surgeon resident without the jurisdiction and the medicine was supplied at his residence and delivery of so much was certainly out of the jurisdiction. He might have been sued for in the Superior Court, as he intended that a man should be allowed to bring two actions.

WILLIAMS, J.—If "cause of action" means "cause of action," a "material point" means "material point of the whole cause of action;" the plaintiff might also choose the County Court. The 128th section gives him an option to sue either in the County Court or in the Superior Court.

in support of the rule, contended that the affidavits were notwithstanding the grammatical inaccuracy. The plaintiff demanded his demand for medicines delivered to the defendant, servant at the Union Club-house, where he (the defendant), which was within the jurisdiction of the Westminster court. With the exception of 13s. the whole of the debt arose within the jurisdiction of that County Court. The action, he therefore contended, arose in some material point within the jurisdiction of that court, and in which the defendant dwelt. If a contrary construction were put on this act, it would go far to do away with its utility, as a few causes of action in which some material point did not fall out of the jurisdiction of each one of the County Courts. C. J.—This rule must be discharged. The affidavits support the application. It is very true that, in some instances, a certain amount of laxity has been permitted; but, at all events, the affidavit ought to be such as to pledge the party making it to the truth of the allegations contained in it. This affidavit contains no particulars. First, it does not show expressly that, at the time of action brought, the defendant dwelt or carried on his business within the jurisdiction of the Westminster County Court; secondly, it does not negative the fact that the plaintiff or the defendant was at that time an officer of the County Court. The affidavits are in the present tense, and apply only to the time at which it was sworn. If this affidavit had been sufficient to raise another question might have required some deliberation, but it is unnecessary to consider it.

WELL, J.—I am of the same opinion. The question raised by the affidavits is one of great importance and deserves serious consideration. But this affidavit is insufficient to raise the question. The defendant said that its only fault is its bad grammar. That is not a good answer if the language employed was insensible, for in its ordinary and popular meaning, the grammar is good. The present tense can apply only to the time of swearing the affidavit and not to the time of action brought. The case of *Fish* (12 Jur. 1004), differs materially from this.

AMES, J., concurred, regretting that the material question had not yet been decided.

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Wigley.

Suggestion—
Affidavit.

Rule discharged.

COURT OF COMMON PLEAS.

Michaelmas Term, 1848.

EDMONDS v. CHALLIS.

Replevin—Evidence—Damages.

A replevin bond conditioned for the party replevying to appear at the next County Court to be holden at, &c. that not being a County Court holden under the 9 & 10 Vict. c. 95, and then and there to prosecute his suit with effect, is insufficient since that act.

Notice being given to produce the bond, and the defendants declining to produce it when called for, a copy obtained from defendants was put in by the plaintiff, whereupon the defendant produced the original.

Held, that the plaintiffs were entitled to have the copy read, and that the defendants could not insist on the bond being read and proved by an attesting witness.

Held also, that the whole amount of the rent distrained for was recoverable as damages.

An averment in the declaration that the said County Court had not, at the time of the taking of the said bond, any jurisdiction to hear or determine any action of replevin, is a sufficient allegation after verdict that it had not jurisdiction at the time of the plaint to the sheriff.

CASE against a sheriff for taking an insufficient replevin bond. The declaration, among other matters, stated that the plaintiffs, within the jurisdiction of the Whitechapel County Court, Middlesex, in certain premises in the county of Middlesex, by or through G. E. their bailiff in that behalf, distrained divers goods and chattels (setting them out) of the value of 47*l.* 4*s.* as a distress for 3*l.* arrears of rent, due from R. to the plaintiff, and detained the said goods and chattels, so taken and distrained for the cause aforesaid until the defendant, then being sheriff of the county, afterward on the complaint of one Kitty Gladman against the said G. E. caused the said goods and chattels to be replevied and delivered to the said Kitty Gladman, and then made deliverance of the said distress to the said Kitty Gladman. That the defendants, so being such sheriff as aforesaid, did not, nor would, before their making deliverance of the said distress, take from the said Kitty Gladman and two responsible persons, sureties as aforesaid, such a bond as aforesaid, conditioned as aforesaid, or any bond except the bond hereafter mentioned, but only took from the said Kitty Gladman and A. M. and R. K. being two responsible persons as sureties, a bond in double the value of the said goods and chattels, to wit, 94*l.* 8*s.* conditioned for the said Kitty Gladman's appearance at the then next County Court for the county of Middlesex, to be holden

at the house known by the name of the Sheriff's Office, in Red Lion-square, in the said county, and for the said Kitty Gladman's, then and there, in the said last-mentioned County Court of Middlesex, prosecuting her action with effect against the said G.E. for taking and unjustly detaining of the said goods and chattels, and for the said Kitty Gladman's making return thereof, if return should be adjudged by law, and for the said Kitty Gladman's well and truly keeping harmless and indemnified the said sheriff, his under-sheriff, deputies, and bailiffs, touching and concerning the replevying and delivery of the said goods and chattels; *which said County Court, mentioned in the said condition as aforesaid, had not at the time of the taking of the said bond any jurisdiction to hear or determine any action of replevin for the taking and detaining the said goods and chattels, or any or either of them, and the Whitechapel County Court of Middlesex was, at the time of the taking of the said bond, the only court in which the said Kitty Gladman could validly commence an action of replevin for taking and detaining the said goods and chattels. By means of which said premises the plaintiffs were wholly deprived of the said goods, &c.*

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At the trial it appeared that the distress was made on the 29th of March, 1847, and the replevin bond executed on the 1st of April, with the following conditions:—"The condition of the above obligation is such, that if the above-bounden Kitty Gladman do appear at the next County Court for the county of Middlesex, to be holden at the house known by the name of the Sheriff's Office, in Red Lion-square, in the said county, and shall then and there prosecute her action with effect against George Ellis, for taking and unjustly detaining of her goods and chattels (to wit), &c. and make return thereof, if return shall be adjudged by law, and shall well and truly keep harmless and indemnified the said sheriff of Middlesex, his under-sheriff, deputies, and bailiffs, touching and concerning the replevying and delivery of the said goods and chattels; then the said obligation to be void and of no effect, otherwise to be and remain in full force." It also appeared that, by the Order in Council, the Whitechapel County Court began to act on the 15th of March, 1847, when the court was opened, and that business was commenced on the 22nd of March, but that the judge did not sit before the 9th of April. The jury returned a verdict for the plaintiff, damages, with rent, 35*l.*; for expenses, 2*l.* 16*s.*; total, 37*l.* 16*s.* A rule *nisi* had been obtained to set that verdict aside, and enter a nonsuit, upon the main ground of objection in the case, namely, that the sheriff had fully discharged his duty with respect to the bond in question, and therefore was not liable in the action. There were also two other points taken as grounds for a new trial. The one was, whether or not the defendant, at the trial, by putting in the original bond, after having at first refused to produce it and compelled the plaintiff to put in evidence a copy, obliged the plaintiff to call the attesting witness. The other point was, whether or not the plaintiff was entitled to the amount of the

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v. without any other proof.

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Baines and M. Dawson showed cause against the rule. common law the remedy for a party who wished to get back goods distrained was by suing out a writ of Chancery, directed to the sheriff, requiring him to give up the goods. The statute of *Middlebridge*, 52 Hen. 3, c. 21, however, was subsequently passed, which after reciting the delay of the former proceeding, provided that upon complaint made to the sheriff he should immediately deliver up the goods to the party whose goods had been taken and distrained; and that was a proceeding out of court, as appeared manifestly from the 1 & 2 P. & M. c. 12, authorizing the sheriff to appoint deputies for the purpose. Then, the 11 Geo. 2, c. 19, s. 1 provided, that the sheriff shall take, in his own name, a bond with two sureties in double value of the goods distrained upon, conditioned for the prosecuting of the replevin suit with effect and without delay, and for returning the goods in case a return was awarded by law; and "such" bond was made assignable to the party distraining as a security. The plaintiff in replevin then followed in the old County Court, unless removed into one of the Superior Courts. So the law stood when the County Courts Act 9 & 10 Vict. c. 95, passed, by section 119 of which it was enacted that "all actions of replevin in cases of distress for rent in arrears or damage feasant which shall be brought in the County Courts shall be brought without writ in a court held under this act;" and then, by section 120, "that in every such action of replevin the plaintiff shall be entered in the court holden under this act for the district wherein the distress was made." The whole of the replevin suit, therefore, was now to be in the new County Courts under that act; but it was nevertheless still the duty of the sheriff to take the replevin bond under the provisions of the 11 Geo. 2 and if he had acted in the present case upon the plain words of the act, no difficulty would have arisen. But in this case he had acted otherwise, and taken the bond in a form which made it a worthless security to the plaintiff. It was conditioned for the appearance of the party at the next County Court for Middlesex, held in *Red Lion-square*, and his, &c., then and there, &c. Now the old County Court for Middlesex had no jurisdiction at all to entertain the replevin suit, and under the late act there were no less than eleven County Courts in Middlesex, so that the bond was conditioned to do something which was legally impossible. Besides, the late act expressly requires that the plaintiff in replevin shall be entered in the court for the district where the distress is made. 1st. The question as to the sufficiency of the bond will depend upon whether it was in accordance with the provisions of the 11 Geo. 2 c. 19, s. 23. This statute requires, among other things, that the bond shall be "conditioned for prosecuting the suit with effect and without delay." The act does not specify any particular court. It merely requires that the bond shall be conditioned to try *with effect and without delay*. But the bond in question does not follow

age of the act, but introduces an additional stipulation, not warranted by the statute,—namely, that the obligor is at the next County Court for the county of Middlesex, then at the house known by the name of the Sheriff's Red Lion-square, in the said county, and *then and there* her action *with effect* against George Ellis," &c. Now it is that if the court referred to had no jurisdiction to try the bond is essentially different from that required by the act, and made assignable by the statutes. So far as the act is concerned it is as if no bond had been taken. In *Hanson* (8 M. & W. 477), there was no question as to the jurisdiction of the court. On the contrary, the declaration averred that the County Court was duly holden. Nevertheless, B. said the words "then and there" were improper, in the case of *Morris v. Mathews* (2 Q. B. 299), Lord Denman, referring to *Jackson v. Hanson*, says, "The difficulty is in the words 'then and there,' which appear from *Jackson v. Hanson* to be improper. Still if introduced they may be binding." Hence the question resolves itself into whether, after the establishment of the County Court, the sheriff has any longer jurisdiction to try an action of this description; for, if not, the condition of the bond is an impossible condition. Now that the jurisdiction of the Sheriff's Court is at an end, so far as actions in replevin for rent or for damage feasant are concerned, it follows, by the 6th section of 9 & 10 Vict. c. 95, all statutory jurisdiction is expressly taken away from other courts over the matters, and of which the district courts have cognizance; the authority of the Sheriff's Courts to entertain plaints in actions of this kind is not of common law right, but is derived from the Statute of Marlborough, and is, consequently, superseded by the provisions of sections 6 and 119 of the 9 & 10 Vict. c. 95. Now, if we refer to the 4th section of the late act, it is "that all proceedings commenced in the County Court, before the time when any court shall be holden under this act in the county, may be continued, &c. in the same manner as if they had been commenced under the authority of this act." The first question which suggests itself is, When is an action properly commenced in the Sheriff's Court? The language of the Statute in this respect is to this effect,—“That the sheriff may, after the return made to him,” &c.; and the word in the original correspondence is *querimonia*. What, then, is the meaning of the word *querimonia*? Is it an expression indicative of the commencement of a suit? It is submitted that it is not. The proper expression for a plaint is *querela*, and not *querimonia*; the latter expression is not, strictly speaking, a word of art, and Coke translated *complaint*, instead of by the more technical expression of *plaint*. It is a summary proceeding, which the Statute says may be taken out of court (2 Inst. 139); and by the Statute of West. 2, something else is required before the defendant is justified in making replevy—namely, he is required to

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take a bond conditioned to return the goods, if return be made, and the 11 Geo. 2, c. 19, s. 23, specifies the kind of bond to be taken in the event of the distress being a distress for rent in arrear. In such a case, two things are necessary to complete the jurisdiction; a complaint, according to the Statute of Marlbridge, and a bond in conformity with the 11 Geo. 2, c. 19; and consequently, until both of these conditions have been complied with, there cannot, properly speaking, be any cause in court, and the case is then only complete when it is actually entered. That this case will further appear by reference to the 1st Westminster Statute of Marlbridge, the sheriff is authorized, mere complaint being made to him that goods had been improperly taken, to make replevy. But this proceeding being within the statute did not authorize him to make a forcible entry if the cattle had been secured within the walls of a castle or manor. This, however, he is empowered to do by the Statute of Westminster 1, which provides that he may enter such places at the request of the plaintiff; which amounts to this, that in ordinary cases he is authorized to replevy the goods upon mere *complaint*; but in cases where a breach of the peace might possibly ensue, something more than a mere complaint is necessary. An action must be commenced, the term *suit* being synonymous with *action*, as defined in all the books: (3 Bla. Com. 295.) But admitting the word *querimonia* to be equivalent to *plaint*, for which there is authority, it will not help the case; for by the 4th section of the 9 & 10 Vict. c. 95, it is provided that "all proceedings commenced in the County Court of any county, before the time when the same shall be holden under this act in such county, *may be continued* as if they had been commenced under the authority of the Statute of Westminster 1, and by sect. 120, in actions of replevin for distress for rent, as enacted, "that in every such action of replevin the plaintiff's complaint shall be entered in the court holden under this act," &c. Now, the words *may be*, in sect. 4, are not optional, but compulsory, and mean *may be*: (1 Wms. Saund. 57 (1).) And if so, then, even though *complaint* be equivalent to the commencement of the suit, nevertheless, if the 9 & 10 Vict. came into operation before the defendant had taken the bond, as is alleged in the declaration, he would not have been bound by sect. 120 to have entered the suit in the County Court, and had not jurisdiction either to enter or to try it in the old County Court. Further, as it was not "such" a bond as was provided with the 11 Geo. 2, it could not be effectually assigned to the plaintiff as a security. The sheriff's duty in respect to the taking of a replevin bond, as laid down in *v. Hanson*, was not altered by the late County Courts Act, the proceedings therein being subsequent to the replevy of the goods as allowed by the sheriff. As, therefore, he had taken a bond which was not assignable, or, if assignable, could not be proceeded upon, its terms being legally impossible of fulfilment, it was just that he should have had taken no bond at all, and he was liable to the plaintiff: (1 Saund. 195 b, 195 h; *Austen v. 1*

327; *Turner v. Turner*, 2 Brod. & Bing. 107; *Morris v. Morris*, 2 Q. B. 299; *Thompson v. Farden*, 1 Man. & Gr. 538.) to the other points, it was submitted the plaintiff was not call the attesting witness (*Jackson v. Allen*, 3 Stark. 74); the damages, the plaintiff was at least entitled to the sh, but for the bond, he might have got in five days after with the expenses of the levy. (*Bules v. Wingfield*, 4 Q. B. 468; *Wylie v. Birch*, 4 Q. B. 547; *Wells v. Iggulden*, 3 B. & C. 284, were re-

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Udall and *Burchell* supported the rule.—The Statute of 11 Geo. 2, c. 19, s. 23. Then came the New County Court, 9 & 10 Vict. c. 95; and, if the 119th section was to mean that the replevin suit in the former County Court was to be brought in the new County Courts, then the sheriff's duty was gone altogether, and the taking of the bond no duty. [MAULE, J.—Yes; I see the contrary Mr. Udall's note on the 119th section, in his edition of the County Courts Act. The learned judge then read the part of bearing upon this point.] It was, in fact, under the Statute of Marlbridge, the very foundation of the sheriff's jurisdiction of "the suit," to which reference was made in the Statute of 11 Geo. 2, c. 19, s. 23. Then came the New County Court, 9 & 10 Vict. c. 95; and, if the 119th section was to mean that the replevin suit in the former County Court was to be brought in the new County Courts, then the sheriff's duty was gone altogether, and the taking of the bond no duty. [MAULE, J.—The jurisdiction of the sheriff is a usual duty,—to deliver up the goods; and surely that duty is not a stop to by the act. What was meant was, merely, that of prosecuting the suit as before in the old County Court, and the party is to carry it into the new County Court.] Then, meaning of the section, taken in connexion with the 120th might be said to be that a plaintiff should still be first made sheriff, who should take the usual bond, but that such plaintiff removed into the new County Court, or that a new plaintiff should be made in the latter court, and that before the sheriff. [MAULE, J.—A plaintiff in the County Courts, under the Statute of 11 Geo. 2, c. 19, s. 23, means a declaration, and a declaration means plaintiff.] It was then, that here the sheriff had taken a proper bond—appear at the next County Court and prosecute, &c. were its terms, they were to be taken in the sense of the Statute of 11 Geo. 2: (*Gwillim v. Holbrook*, 1 Bos. & Pul. 410; *Hanson*; *Short v. Hubbard*, 2 Bing. 349.) The words "there" in the bond meant in the appropriate place. [MAULE, J.—Here the particular mode, as formerly, of performing the duty, was taken away. It could not be done by going to the square at a particular time. There was no mode of pro-

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secuting the suit with effect secured; nothing whatever to be done "then and there."] There was still a plaint to be levied in Sheriff's Court, and if so, then there was something to be done then and there, and the bond was as good as ever. But suppose it were otherwise, still, as the obligor was called upon to prosecute the suit with effect, and as upon the authority of *Gwillim v. Ebrook*, the calling upon a party to do something that he was bound to do did not vitiate the bond, the present might be treated as a good bond under the 11 Geo. 2. It was assignable, though not strictly according to that act (*Dunbar v. Dunn*, Price, 54); and, on the whole, therefore, the sheriff could not be considered liable in the present action. Then, as to the other points raised. First, the attesting witness ought to have been called, the original bond was put in: (*Rearden v. Minter*, 5 M. & G. 20). Secondly, the tenant may be able to pay the rent irrespective of the bond, and, if so, the damages are merely nominal, and some evidence ought to have been given of the particular circumstances of the distress: (*Scott v. Henley*, 1 Moo. & Rob. 227; *Morris v. Binson*, 3 B. & C. 206.)

Cur. adv. vult.

JUDGMENT.

COLTMAN, J.—This was an action against the Sheriff of Middlesex, for not having taken a replevin bond in conformity with the statute 11 Geo. 2, c. 19, s. 23. The case was tried before my brother Cresswell, and a verdict was found for the plaintiff for 35s. but leave was reserved to enter a verdict for the defendant, if the court should be of opinion that the bond which was taken was sufficient within the meaning of the act. In the ensuing term, rule was obtained for entering the verdict for the defendant, or for a new trial, or to arrest the judgment. It appeared by the judge's report that the distress out of which the action arose was a distress taken within the district of Whitechapel County Court of Middlesex, and the condition of the bond was, that the obligor should appear at the next County Court for the county of Middlesex, to be holden at the house known by the name of the Sheriff's Office in Red Lion-square, and should then and there prosecute his action with effect against George Ellis, for taking and unjustly detaining her goods, &c. and make return thereof, if return should be adjudged by law. The bond which has been taken in this case is in a form often used before the passing of the act 9 & 10 Vic. c. 95. Now the question is, whether such a form, since the passing of that statute, is sufficient. By the 119th section of that act, all actions of replevin in cases of distress for rent in arrear, which shall be brought in the County Court, shall be brought without writ in a court held under the act; and by sect. 120, plaint shall be entered in the court holden for the district wherein the distress was taken. As this statute leaves the former statutes relating to replevin unrepealed, there is no reason why the sheriff, on complaint made to him, should not grant replevin as before, and take

the statute 11 Geo. 2, as before, and if the bond were terms of the statute, conditioned to prosecute the suit and without delay, and to make return, if return awarded, the sheriff would have been under no difficulty; and being taken with a condition for the plaintiff to the next County Court for Middlesex, to be holden at the Office in Red Lion-square, and then and there to enter action with effect, and to make return, if return adjudged, the question arises whether such a bond is valid. Various cases are to be found in which the courts have decided strictly conformable to the statute of George 2 are within that statute, so as to enable the assignee to maintain on the bond, where there had been a breach of one of the conditions of the condition, which had been taken conformable to the statute. Thus, in the case of *Short v. Hubbard* (37), it was held to be no objection to such a bond that it was conditioned, *inter alia*, to indemnify the sheriff. So in *Dunn* (10 Price, 54), where the bond was conditioned with effect, and to make a return, if a return was made to indemnify the sheriff, it was held that the plaintiff could sue on the bond, though it was not conditioned to do so without delay. These were questions between the sheriff and the obligors of the bond; but they may be different where it arises between the party discharging the sheriff who has taken a bond conformably to the statute in order to determine this question, it will be convenient to consider the effect of a bond taken in the form here used before the passing of the statute 9 & 10 Vict. c. 95. The object of taking such a bond is conditioned for the obligor to appear at the next County Court and there to prosecute his suit, appears to be in order to enable the plaintiff to commence the action without delay, so as to comply with the requirements of the statute that the obligor shall prosecute without delay, and if the obligor omitted to appear at the next County Court, and there prosecute his suit, it was a breach of the statute, and the bond was forfeited and the plaintiff could sue on it by the assignee: (*Dias v. Freeman*, 5 T. R. 135.) The effect and meaning of a bond conditioned like the one here is a question which was under the consideration of the Court of Queen's Bench in the case of *Jackson v. Hanson* (8 M. & W. 487); and it was held that the meaning of such a bond to be, that the obligor should appear at the next County Court, and then and there to prosecute his suit, and afterwards prosecute it with effect, by prosecuting with effect is meant prosecuting with effect in the County Court, but in every other court into which the case may be removed in the ordinary course: (*Chapman v. Chapman*, 11 M. & W. 248; *Gwillim v. Holbrook*, 1 B. & P. 410.) Now, the question which ought to be put on the bond is not altered by the passing of the statute 9 & 10 Vict. c. 95, and the question will be, whether a bond is still a substantial compliance with the requirements of the statute 11 Geo. 2, the condition of the bond

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being, first, that the obligor shall appear at the next County Court and then and there begin to prosecute his suit. This branch of the condition will be merely idle if the effect of the statute in Victoria is to substitute a proceeding in the District Court in lieu of the old proceeding in the County Court; and it appears to be that such is the intention and effect of the act. The words of the act, sect. 119, are express, that all actions of replevin, in cases of distress for rent, shall be brought in a court held under the seal, and it cannot be supposed that the plaintiff in replevin is to bring two concurrent actions, one in the old County Court, the other in the District Court. It must, therefore, be intended that the proceeding in the District Court shall be substituted in lieu of the former proceedings in the County Court. It may be said, however, that although this branch of the condition is idle, as imposing a duty on the obligor which the statutes do not any longer warrant, and for a breach of which the assignee of the bond could maintain no action, yet the rest of the condition is conformable to the statute 11 Geo. 2, and may be enforced by the assignee of the bond. Now, the remaining branch of the condition is that the obligee shall prosecute his suit with effect; and the proceeding in replevin having been well commenced in the first instance by the plaintiff, the sheriff out of court, and the bond entered into by him, and the proceedings being, in effect, by force of the act of 9 & 10 Vict. c. 95, directed to be transferred to the District Court, and there prosecuted; the effect of this portion of the condition may be to bind the obligee to prosecute with effect in the District Court, on the same principle on which it was held that such a condition bound him to prosecute, not only in the Sheriff's Court but in every other court into which the case might be removed in the due course of law. Still there is another requisition of the statute which the bond does not comply with, for the bond shall be conditioned for the prosecuting of the suit *without delay*. As the law stood before the passing of the statute 9 & 10 Vict. this was considered as being sufficiently provided for by requiring the obligor to appear at the next County Court, and then and there to prosecute his suit; but this provision is no longer applicable; the suit is no longer to be prosecuted in the County Court, but in the District Court. The District Courts are to be held, by sect. 56, at such times as the judge shall appoint; and it may well be that the court for the district within which the distress was taken, and in which the plaintiff ought to enter his plaint, will be holden before the holding of the next County Court, in the Sheriff's Office, in Red Lion-square. And be that as it may, there are no conditions requiring the plaintiff to prosecute his suit at the next or at any other District Court, and the proceeding may be indefinitely delayed without any breach of the condition of which the assignee of the bond can take advantage. We think, therefore, that the bond is insufficient, and consequently the defendants are not entitled to have a verdict entered for them. The ground on which the application for a new trial was rested was a supposed misdirection

in evidence the replevin bond without due proof of the by the subscribing witness. It appeared by the report e had been given to the defendants to produce the bond. tiff's counsel called for the bond, which the defendant's clined to produce. On the part of the plaintiff a copy iced, and proved to have been obtained from the Sheriff's d was about to be read; whereupon the counsel for the produced the original, and insisted that it could not be the subscribing witness had been called. The docu- wever, was read without the production of the witness, ontended that this ought not to have been done. We ver, of opinion, that that evidence was properly received. ment having been in the first instance kept back, and the aying entitled himself to read a copy without any proof en that there was a subscribing witness to the original t, and having put it in to be read, the defendant's counsel p his opportunity, and had no right then to interpose and he original; and although, in point of fact, the original that was but by a sort of legerdemain, and the proper must be considered as having been read, which was the uced and proved by the counsel for the defendant. The ickson v. Allen (3 Stark. 74), bears out our view of the he plaintiff's counsel under such circumstances. Another 1 which the motion for a new trial was rested, was the the damages, which were to the whole amount of rent Judgment. or. But we see no reason to think them too large. If d been taken conditioned to prosecute without delay, the er the circumstances of this case, would have been for- l the amount of the rent would have been a reasonable of the damages. The case is not like the case of an mesne process, for the distrainer has a real security for and if the replevin had not been granted, he would have oods, and would have put the money in his pocket. If a ond is taken, and afterwards forfeited, or if the sheriff ake a bond with the proper condition, the plaintiff ought in as good a situation as he was in before. The ground it was sought to arrest the judgment was, that the n only alleged that the County Court had not jurisdiction e of taking the bond, and that it ought to have alleged jurisdiction at the time of the plaint to the sheriff. But this is in substance alleged, for the allegation that the court had not jurisdiction at the time of taking the bond action of replevin, for taking and detaining the said goods, be true, if it had had jurisdiction at the time of the he sheriff; for if it had had jurisdiction at that time, its n, having once attached, would have continued, by virtue h section of the act, and would have existed at the king the bond. The rule, therefore, must be discharged.

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Rule discharged.

COURT OF COMMON PLEAS.

Easter Term, 1849.

REED v. SHRUBSOLE.

Suggestion—Jurisdiction—Costs.

If defendant suffers judgment to go by default and the jury on the trial of inquiry assess the damages at 40s. only, he is not entitled to enter a suggestion to deprive the plaintiff of costs under the County Courts Act. CRESSWELL, J., dissentiente.

TRESPASS, for assault and battery.

The defendant suffered judgment by default, and upon a writ of inquiry before the Under-sheriff of Kent the damages were assessed at 40s. The defendant then, in pursuance of a rule of Court, entered a suggestion on the record to deprive the plaintiff of his costs under the County Courts Act, 9 & 10 Vict. c. 6, s. 129, and to this suggestion the plaintiff demurred.

Creasy, in support of the demurrer.—The question is, whether sect. 129 of 9 & 10 Vict. c. 95, applies to cases in which the defendant suffers judgment by default. That section, in cases of torts, enacts, "that if any action shall be commenced in the Superior Courts, for which a plaint might have been entered in a County Court, and a verdict shall be found for the plaintiff for less sum than 5*l.*, the plaintiff shall have judgment to recover such sum only, and no costs, &c., unless the judge who shall try the cause shall certify that the action was fit to be brought in the Superior Courts." That clearly contemplates cases where the judge can grant a certificate, and a writ of inquiry is not such a case, for the sheriff has no power to certify. The sheriff has no power to certify under the 43 Eliz. c. 6, s. 2, to deprive the plaintiff of costs where the verdict is under 40*s.*: (*Wardroper v. Richardson*, 1 A. & E. 75; *Claridge v. Smith*, 4 Dow. 583.) In the former case, Littledale, J., says, "The words 'judges' and 'justices,' in the statute of Elizabeth, cannot mean any but the judges and justices of the Courts at Westminster;" and Parke, J.—"It certainly was not intended by 3 & 4 Will. 4, c. 42, s. 17, to give the power of certifying to sheriffs, and other judges, to whom causes were sent by writ of trial. There was once a clause in the bill to this effect, but it was struck out." In *Littlewood v. Smith* (1 Lord Raym. 181), it was held that the 21 Jac. 1, c. 16, s. 4, which deprives the plaintiff in actions of slander "in any of the Courts at Westminster, or in any Court whatsoever, that hath

power to hold plea of the same," of costs where the damages are under 40s., did not extend to courts baron. In Bull, N. P. 329, it is said that "in writs of inquiry in cases within the 22 & 23 Car. 2, s. 9, the plaintiff shall have full costs, though the debts are under 40s.:" (*Sheldon v. Ludgate*, 3 C. B. T. 3 Geo. 1.) The learned counsel then cited *Bale v. Hodgetts* (1 Bing. 182), *Strutton v. Whitwell* (1 Man. & Ry. 562), *Waller v. Deane* (8 Sc. N. R. 760), *Harris v. Lloyd* (4 M. & S. 171), and *Dunster v. Day* (8 East, 239.) Here the plaintiff has no chance of getting the certificate contemplated by the section; and he could not know that the defendant could suffer judgment by default. This section would not apply to actions of debt where there is a judgment by default, as no writ of inquiry is necessary.

Wise, contra.—This section does apply to this case, though the cases of *Pritchard v. McGill* (2 M. & W. 380), and *Jones v. Barnes* (M. & W. 313), decide that a sheriff cannot give a certificate. He has power to give a certificate has nothing to do with the question, because the jury have decided the action to be a frivolous one, or one that ought to have been brought in the County Courts, by the damages which they have given; and the spirit of the act is to deprive plaintiffs of their costs in such cases when they proceed in the Superior Courts. The plaintiff is deprived of costs by the finding of the jury of frivolous damages, and not by the act of the defendant in suffering judgment by default. In *Harris v. Lloyd* the decision went upon the words in the act of Parliament, "trial of the cause." But the cases of *Bishop v. Marsh* (6 Bing. N. C. 1), and *Forbes v. Symmonds* (9 Dowl. 37), establish that a plaintiff may be deprived of his costs under the Middlesex Court of Requests act, although the judge had not power to give a certificate contemplated by the act, which would have had the effect of securing to the plaintiff his costs. (*Nind v. Rhodes*, 1 Cox & Macrae, 155; *Series v. Beart*, 1 Cox & Macrae, 194; and *Booth v. Ibbetson*, 1 You. J. 354, were then referred to.) It would be sufficient for the defendant to plead the first part of this clause, and the plaintiff would have to reply the proviso: (*Simpson v. Ready*, 12 M. & W. 6; *Pilkington v. Cooke*, 16 M. & W. 627.) If the defendant had pleaded not guilty, however false that would have been, he would have been entitled to the benefit of this clause; and now, though he admits the wrong, and the damages establish that it is a frivolous action, it is said that he is not. [WILDE, C. J.—This is not a question of pleading, but on the construction of the act, might not the word "verdict," in the former part of the section, be controlled by the latter part to mean a verdict at the trial?] The word "verdict" is capable of two meanings, and would apply to the finding of a jury on a writ of inquiry. The clause is divided into distinct parts; and the first is to be construed without reference to the proviso. It may be that there are many cases not provided for by the section; but it is submitted that the verdict of a jury of less than 5*l.* on this writ of inquiry, brings the case within the clause, and that the plaintiff is not entitled to his costs.

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Creasy, in reply, cited *Brooker v. Cooper* (18 L. J. 41, Ex.), and *Jones v. Brown* (17 L. J. 163, Ex.), and *Jones v. Savage*, and *Lewis v. Hance*, there referred to.

WILDE, C. J.—It seems to me, on the best consideration I can give to the case, though I own I entertain some doubt, that the case is not within the statute, and that a suggestion ought not to be entered. Two objections have been urged against the rule: the first, that this is a case in which there is no power of obtaining the certificate contemplated by the latter part of the 129th section; and the second, that this is a case in which the cause has not been tried and a verdict has not been found for the plaintiff as was intended by the 129th section, in order to deprive him of his costs. With respect to the first objection, the absence of the power to certify that the action was fit to be brought in the Superior Court, though it seems to be removed by the cases cited, *Bishop v. Marsh*, and *Forbes v. Symmonds*; where, under the Middlesex Court Requests Act, the objection that the judge had not power to certify, in cases contemplated by the act, was held not to prevent the act applying to deprive a party of costs. With respect to the second objection, I own, it seems to me, that it is well founded, and that this section had not in contemplation the case of a judgment by default. When I look at the whole clause, notwithstanding the mode in which it is framed, being apparently divided into different sections, it appears to me to be confined to the case in which there has been a trial of the cause, excluding the case of a judgment by default. The clause runs—"If any action shall be commenced in any of the Superior Courts, for which a plaintiff may have been entered in any court under this act, and a verdict shall be found for the plaintiff for a sum less than 5*l.*, the plaintiff shall have judgment to recover such sum only, and no costs." If the clause had stopped there, there would have been more difficulty in its construction. And notwithstanding the argument that has been deduced from the rule in pleading, that it would have been sufficient for the defendant to have pleaded this part only of the clause, and that the plaintiff would have been compelled to bring forward the latter part, yet this does not dispense with the duty of looking at the whole of the clause, in order to find the meaning of any particular part of it. The clause then proceeds—"and if a verdict shall not be found for the plaintiff, the defendant shall be entitled to his costs as between attorney and client." In what case can a decision occur in which a verdict shall not be found for the plaintiff? Certainly, not in a case of judgment by default; because that has passed the stage of such verdict, and judgment of the court has been had, interlocutory only it is true, because the court is not informed what the damages are. And when the clause continues—"unless in either case the judge who shall try the cause shall certify that the action was fit to be brought in such Superior Court," we have still greater difficulty in supposing it to apply to a case of judgment by default, or that it was intended in the absence of

for the plaintiff which cannot be found for him, that he is subjected to double costs. The plaintiff does not fail to verdict; but his case is so well founded that he gets a judgment without a verdict. This is very strong to show that the contemplated cases of trial in which the plaintiff might not verdict, and not cases of judgment by default. There are cases in which the court assesses the damages without the action of a jury, and is it to be intended that in all those cases the plaintiff is not to have costs, but to be bound to pay them? Those cases may embrace matters of the greatest importance, though the damages are of inconsiderable amount. Notwithstanding the able and ingenious argument of Mr. Wise, looking to the whole spirit and frame of the clause, I am of opinion that the Legislature had not in its contemplation the case of judgments by default, and that the framer was looking at another and distinct question. I think, therefore, that the plaintiff is entitled to his costs.

MAN, J.—I also am of opinion that the plaintiff is entitled to judgment. It is quite clear that the plaintiff is entitled to costs under the Statute of Gloucester, unless they are taken away by this act. I agree that this section may deprive a plaintiff of costs in some cases, although no certificate can be given under the act, namely, where there is a trial of the cause. Yet we are directed to look at the proviso, and consider it, and to construe the section with reference to the rest of it. And it appears to me that it does contemplate only cases in which there has been a trial of the cause. The words in the proviso, "unless in the case the judge who shall try the cause," reflect light on the subject, and show that the section only contemplates cases where there has been a trial of the cause. Such appears to me, on due consideration I can give, to be the meaning of the section. It would be very serious if another construction were given to it. It might give rise to great injustice if a defendant, by judgment by default, could deprive a plaintiff of costs.

SWELL, J.—I certainly entertain very great doubt whether the opinion of my Lord and my brother Coltman is correct. I concur in their view. The question depends entirely on the true meaning of the section. It has been decided where costs are to be taken unless a certain thing is done, the deprivation of costs is limited to cases in which the thing to be done can be done; the Middlesex Court of Requests Act is not limited to cases in which the certificate contemplated by it can be given. If we put aside the latter part of the 129th section, I must construe the former part without it. It speaks of a verdict and for the plaintiff. No doubt the ordinary meaning of "verdict" is on trial of an issue; but in common parlance "verdict" is frequently applied to the finding of a jury on an inquiry of damages. In Lord Denman's Act, 3 & 4 Vict. c. 24, s. 2, it is there it provides for the depriving of costs in respect of a sum of less than 40s., "whether it shall be given upon any issue

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or issues tried, or judgment shall have passed by default, unless the judge or presiding officer before whom such verdict shall be obtained shall certify." I do not know why we are to put a most limited construction on that word in this statute. It is said that the second part of the clause, "and if a verdict shall not be found for the plaintiff," &c. supposes the first part to be limited to cases of trial of the cause. I do not know why that should be so. It is said to be monstrous to apply it to the case of computation by the Master, but that is no reason why we should not apply it to the case of a finding by a jury. But I do not see any necessity, when the court is in a condition to give judgment for a certain amount without a writ of inquiry, to apply this section. Then it is said that difficulties may arise from this construction. At present I cannot see all that may arise on one side or the other; I may therefore, put the best construction on it I can. I find that, by section 58, these courts are excluded from jurisdiction in certain actions supposed to involve difficult questions of law or fact. Therefore, whatever may be the difficulty of the question to be determined, I apprehend that it was intended to give jurisdiction of all questions except those excluded by the 58th section; and the spirit of the act is to deprive the plaintiff of costs where he obtains less than the sum specified, in all cases where jurisdiction is given. And in this, the plaintiff, in the estimation of the jury is not entitled above a certain amount, which is less than the specified sum. I therefore think that he is not entitled to costs.

WILLIAMS, J.—I agree with the Chief Justice and my brother Coltman, that the plaintiff is entitled to our judgment. The question is, whether there has been a verdict here for less than 5*l*., and I think there has not. I think that the word "verdict" in this section means verdict on the trial of the cause, and not on a writ of inquiry, after judgment by default, or on demurrer. I agree with my brother Cresswell that the Legislature has excluded many cases in which difficult points may arise. At the same time I think that it is equally clear that in this section it contemplated the class of cases fit to be brought into the Superior Courts, though not falling within the proviso to sect. 58. If there were otherwise the clause referring to the certificate would not have been inserted. Then, if suits of that nature have been contemplated as fit to be brought in the Superior Courts, it seems to me absurd to suppose that it was intended that defendants should have power, by suffering judgment to go by default, to deprive plaintiffs of their costs. We shall avoid this incongruity by giving to the word "verdict" in the clause the meaning of verdict upon the trial of the cause, and we shall avoid also the further incongruity that would arise in actions on bills of exchange, where there is a reference to the Master to compute, and where, if a contrary construction were to prevail, the plaintiff would not only lose, but would have to pay costs.

Judgment for the plaintiff.

COURT OF COMMON PLEAS.

Easter Term, 1849.

WOODHAMS v. NEWMAN.

Jurisdiction—Cross accounts—Set-off.

plaintiff brought his action in a Superior Court against the defendant for, and proved a debt of, more than 20l. There were cross accounts between the parties, which had not been balanced. The defendant pleaded and proved a set-off, which reduced the plaintiff's debt below 20l. and the verdict passed accordingly. A rule nisi had been obtained, under 9 & 10 Vict. c. 95, s. 129, for leave to suggest upon the roll to deprive the plaintiff of his costs, on the ground that he ought to have sued in the County Court: but as the case did not come within the act.

In this case a rule had been obtained by R. Clarke, calling upon the plaintiff to show cause why the record should not be amended by the plaintiff, and a suggestion entered thereon under 10 Vict. c. 95, s. 129, to deprive the plaintiff of his costs. The motion was tried before Maule, J., at the last sittings for Easter Term.

The sum claimed was 100l. To this defendant pleaded a set-off into court of 18l., set-off 80l., and to the remainder, never less than 20l. A verdict was found for the plaintiff for 20s., and the plaintiff then requested to certify for costs, declined, with an intimation that he should leave the parties to apply to the full court.

The defence now showed cause against the rule.—The substantial question before the court is, whether, under the circumstances of this case, the plaintiff should have elected to proceed in the Inferior Court instead of suing in the court above. The plaintiff's claim, amounting to 100l., was reduced by the set-off to 20s., and it had been intended that, therefore, this is a case within the County Courts Act. There are two sections material to this question. Section 129, it is enacted that "if any action shall be commenced in the Inferior Court of Record for any cause for which a plaint might be entered in any court holden under this act, and the plaintiff shall have a verdict for a sum less than 20l., if the action is on contract, the said plaintiff shall have judgment to recover such sum, and no costs." The other material section, and that which turns this case, is the 58th section, which gives jurisdiction to the County Court over "all pleas of personal action where the debt or damage claimed is not more than 20l. on balance of account or otherwise." It is submitted that this case does not come within the terms of those sections.

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Here the sum claimed was greatly beyond the amount to the jurisdiction of the County Court extends. It is true the verdict was for a sum within the statute, but as there had been no balance of accounts between the parties, the defendant not given in his account, it was impossible the plaintiff could know what sum of the set-off could be proved against him, and therefore if, ignorant of this, he had gone to the Inferior Court and received judgment for 20*l*., whilst the amount due was larger, he was taken to have abandoned the excess, and thus be a loser. It is therefore impossible that the plaintiff could know in which court he should sue, without knowing the sum actually due upon the account. [WILDE, C. J.—What is the nature of the set-off?] For the plaintiff's account of labour and goods sold and delivered. It cannot be held that this is a case coming within the words of the 58th section, "whether on balance of account, or otherwise." There was no balance of accounts. The cases on this point will be found in 2 Chitty's Archb. 1401. (He cited *Bailey v. Chitty*, 2 M. & W. 28.) [CRESSWELL, J.—Was there any contention at Nisi prius as to the set-off? There was a case on this question in the Exchequer: (*Tuck v. Tuck*, 5 M. & W. 109).] [WILDE, C. J.—The plaintiff is in this position, that if he sues the defendant in the County Court, he is either nonsuited or takes a verdict by default for 20*l*., giving up the excess. The defendant, knowing the plaintiff's excess was abandoned, might not plead his set-off there, but bring his action for his claim in the Superior Court.] The object of the Legislature in framing the Small Debts Act was to limit the jurisdiction of the County Courts to cases clearly within their jurisdiction and not to interfere with large claims, where an actual balance and *pro tanto* settlement has not been made. (He cited *J. Harris*, 1 Dowl. 374, and cases there referred to; *Pitts v. Penner*, 2 Strange, 1190; *Cottle v. Langman*, 9 Mood. 625; *v. Fisher*, 3 Wils. 48.) Another point is with regard to the rule for a suggestion asks roundly to deprive us of the money. Here there has been a payment into court; therefore, in such events, we are entitled to costs upon the money so paid into court. *R. Clarke*, in support of the rule.—This is a question without difficulty. Regard must not be paid to the sum claimed; for the sum recovered by verdict, and not the sum claimed, is the debt in dispute: (*Fairbrass v. Pettit*, 1 Dowl. 622; *Laing v. Chatham*, 1 Camp. 251; *Drews v. Cole*, 1 Dowl. 503.) [MAULE J.—The difficulty is this: Could the plaintiff, without prejudicing himself, have levied a plaint for this sum? how could he have entered it?] A question arises, whether the words "of action" does not mean description of action, whether *assumpsit* debt, or such like. The words of the 54th section, "whether on balance of account, or otherwise," comprehend such a case as the plaintiff here carried into a Superior Court. [MAULE, J.—Do the words "or otherwise" mean "or not?"] The court should give to those words a narrow construction. The disposition of this time is to extend, and not narrow, the jurisdiction.

County Courts; therefore, unless the court should clearly be of opinion that those words do not include actions where there are set-off accounts, such as in this case, this rule should be made absolute. It would still be in the defendant's power to dispute the question by traversing the suggestion.

WILDE, C. J.—It seems to me that this case does not fall within the County Courts Act, and, therefore, that the plaintiff should not be deprived of his costs in this action. The application is founded on the 129th section of the County Courts Act, which enacts, that “if any action shall be commenced after the passing of this act in any of Her Majesty's Superior Courts of Record, in any cause for which a plaint might have been entered in any court holden under this act, and a verdict shall be found for the plaintiff for a sum less than twenty pounds in an action on contract, the plaintiff shall have judgment to recover such sum only, and no more, unless the judge shall certify.” It is, therefore, clear, that if a verdict in a Superior Court can have the effect of depriving the plaintiff of his costs, the action must have been one for which a plaint might have been entered in the County Court. Now, is that the case here; was this such an action as should have been brought in the County Court? In construing this act, we must not confine our attention to one clause, but look at all the clauses in the act that bear upon the matter we have to decide. The 58th section is considered material, and as assisting us in the construction of the 129th section. The 58th section enacts, “that in pleas of personal actions, where the debt or damage claimed is not more than 20*l.*, whether on *balance of account, or otherwise*, to be holden in the County Court, without writ.” Now, it is said that this is a case in which a plaint might have been levied in the County Court, because, it is contended, a debt which is set-off by a set-off to a sum within 20*l.* is within the meaning of the words “balance of account, or otherwise,” in the 58th section. Looking at the whole act, I think those words were meant to apply to cases where the parties had themselves balanced an account, or where there had been payments on account; but, whatever may be the meaning of those words, the present does not appear to me a case in which a plaint could have been entered in the County Court. The policy of the act was to give jurisdiction to those courts, for the decision of small disputes without writ, otherwise one can hardly see any reason for the limitation of the jurisdiction of those courts. Here, a large sum is in dispute. There was a set-off of 80*l.*, leaving a balance of less than 20*l.* This might involve questions of considerable nicety. The case might have turned upon some one item which might be more than 20*l.*, or it might depend on items in the set-off to a large amount. In looking for the proper mode of construing the act, we must therefore consider the inconveniences to which any particular construction might lead, and give the Legislature credit for having anticipated that inconvenience, and legislated with regard to it. What was the plaintiff's demand? It exceeded 20*l.*;

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—
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therefore, if the plaintiff had sued in the County Court, and established his case, that court must have adjudicated upon a sum exceeding 20*l.*; then it would have had to turn to the defendant's case to see how that account was to be rendered, and there again it would have to decide on a demand above 20*l.*; after which it would strike a balance between the accounts, and award its judgment thereupon. It would be in fact trying two causes, each of which was above 20*l.*, and therefore beyond its jurisdiction. How, then, was the plaintiff to proceed in levying his plaint? It is extremely difficult to conceive. If he had levied his plaint for 20*l.*, how was he situated with regard to the set-off? He could not enter his claim to the full amount, anticipating a set-off, for his plaint would show upon its face that the court had no jurisdiction; on the other hand, if he went for 20*l.* only, he would be taken to have abandoned the residue of his claim. It is difficult to see how he could levy his plaint in the County Court without prejudice to himself. He may be unaware of the nature and amount of the set-off against him. How is he to act? Can he, by giving the defendant credit, go into the County Court and prevent the defendant suing him for the amount of the set-off in a Superior Court? If he knew the amount of the set-off, and was willing to give credit for it, no injustice would be done; but he has no means of knowing the amount of defendant's set-off, and perhaps not its nature. The difficulty, then, is to see how, in such cases as these, a plaint could be entered in the County Court. I do not see how the plaintiff could do it. The case, therefore, is not, in my opinion, within the words or the meaning of the act, and therefore a suggestion cannot be entered. As to permitting the rule to go, leaving the plaintiff to traverse the suggestion, and thus giving an opportunity for further consideration of the question, the court would but ill discharge its duty if, having no doubt upon the subject, and being well aware that the policy of the act was to provide cheap law and suppress litigation in respect of small sums, it should, by granting this rule, afford an opportunity for adding materially to the expenses already incurred. For these reasons this rule must be discharged.

COLTMAN, J.—The County Courts, being intended for, and having for their scope and object, the trial of small causes, should not be permitted to include such a case as is now before the court, and under colour of adjudicating on a claim of 20*l.*, in fact to try two actions, in each of which the sum claimed would be far beyond the amount over which their jurisdiction extends. I agree that the "debt claimed," as mentioned in the 58th section, is to be considered to be the amount recovered. But this does not extend to cases where the defendant established a counter claim, which reduces the sum claimed by the plaintiff. The jury here established the plaintiff's right formerly to an amount above 20*l.*, subject to such reduction as the defendant could establish. The original debt here was 100*l.*, and the plaintiff must be taken to have made good his claim for that amount. If, without prejudice to himself, he could

he County Court. The question, therefore, is, whether
cause of action for which a plaint might have been entered
act. The meaning of section 129 is, that if the plaintiff
e tried the cause in the County Court without prejudice
n, and that court could have meted out the same measure
as the Superior Courts, then he should have gone to it;
did not, but chose to sue in the court above, he is to be
f his costs. But if the claim is large, and he is ignorant of
which can be proved against him, and therefore goes to
ior Court, it seems a practical absurdity to say he shall be
of his costs. The question therefore is, would the plaintiff,
to the County Court, have obtained the same measure of
He has a claim against the defendant for a large amount. If
the Inferior Court, he will be taken to abandon the excess
n over 20*l*; if he goes to the Superior Court, he is to be
f his costs. Such would be his position. I cannot see,
he can be justly placed in such a dilemma. As to the
the 58th section, I think, on principle, that "amount
must mean amount recovered, that is, amount decided by
be due to the plaintiff. But in the case of a set-off the
d find that the plaintiff had a claim for such and such
t, liable to be reduced by the sum proved to be due to the
; so that the argument of the defendant on this point
pply. A suggestion could only be granted in this case
ie debt claimed is, in the language of the 58th section, a
of account, or otherwise," and that must mean balance of
etween the parties: as set-off is not a balance of account,
not interpose any material obstacle in the way of our
This rule must be discharged.

WELL, J.—I agree with my learned brothers in thinking
; a case within the 129th section of the County Courts
ch takes away costs where a plaint might have been
r the sum recovered. I am of opinion that, when really
the contention is for a matter above 20*l*, then the

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the excess, he would have no remedy in case defendant recovered from him the overplus of his set-off above 20*l*. Moreover plaintiff could not give credit at the outset for the defendant's set-off, and the 76th section expressly provides, that no defendant be allowed to set-off any debt unless he gives notice of it, that the defendant might avail himself of his set-off or not, as he chooses. This is not, I repeat, a case within the 129th section of the Courts Act, therefore the rule must be discharged.

Rule discharged.

COURT OF EXCHEQUER.

Easter Term, 1849.

BETTELEY v. BUCK.

Jurisdiction—Promissory note.

*In an action by the indorsee against the drawer of a promissory note less than 20*l*., the defendant traversed the notice of dishonour. He proved that the bill had been drawn and indorsed within the jurisdiction of the County Court in the district of which the defendant resided, but the notice of dishonour had been given in another district. Held, that the cause of action arose in a material point within the jurisdiction of the County Court, and leave was given to enter a verdict to deprive the plaintiff of costs.*

THE case being tried in vacation, plaintiff signed judgment the day of trial. Defendant obtained a summons to set aside the proceedings; the court directed the judgment to be set aside, and would not allow the plaintiff the costs of it.

A rule having been obtained in this case, to set aside the defendant's judgment, and to enter a suggestion to deprive him of costs under the 9 & 10 Vict. c. 95. s. 129,

Lush showed cause.—This was an action by an indorsee against the drawer of a bill of exchange for a less sum than 20*l*. Defendant, by his plea, traversed the notice of dishonour. At trial before the under-sheriff, it appeared that the bill was drawn within the jurisdiction of the County Court where the defendant resided, but the notice of dishonour was given elsewhere. The case was tried on the 8th of March, and a verdict having been returned for the plaintiff, judgment was signed on the same day. The def

ask out a summons to stay proceedings, in order that the application might be made. The notice of dishonour is the part of the cause of action, and it did not arise within the jurisdiction of the County Court. [PARKE, B.—When the action is brought you cannot know what will be traversed.] If this rule is absolute, it ought to be on payment of costs of the judgment of this application, as the judgment was regularly signed. PARKE, B.—You ought to have given the defendant an opportunity of moving to stay the proceedings before you signed the rule. PARKE, B.—They are not to pay for your speed. Your practice is sharp.

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Rule absolute.

COURT OF EXCHEQUER.

Easter Term, 1849.

SUTTON v. PARMENT.

Superior Court—Cause of action.

Superior Courts will not entertain an action to recover a less sum than forty shillings, unless there is no other court in which the action can be brought.

PARMENT showed cause against a rule, obtained by SUTTON, calling on the plaintiff to show cause why, on payment of 1*l.* 4*s.*, the proceedings in this cause should not be stayed, it being beneath the jurisdiction of this court to entertain an action for a less sum than forty shillings.

There are two objections, either of which will be an objection to this application: first, the defendant must wait until the verdict, and then apply for a suggestion, because, until it is impossible to say that the judge might not certify; secondly, the plaintiff lives more than twenty miles from the court, and therefore the action need not be brought in the County Court, but in the Superior Court. By the local act of the County of London, 39 & 40 Geo. 3, c. civ. if the plaintiff brought any action in the Superior Court, which might have been brought in the County Court, he was deprived of costs. That statute remained in force until the local act 5 & 6 Will. 4, c. xciv. whereby the Statute depriving the plaintiff of costs was repealed, leaving the

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case as it stood before. In the general County Courts Act, however, there is the same clause that was inserted in the first City of London local act. In the case of *Sandel v. Bennett* (2 Ad. & Ell. 204), the defendant attempted to plead, in bar of the action in the Superior Court, that the debt was under forty shillings, and ought to have been brought in the inferior court, but the court held the plea to be bad. I contend that these local acts and the general County Courts Act have controlled the general discretion of the court, and have, in fact, taken it away, and that they have not the same discretion that they used to have in matters of this description.

Lush, in support of the rule.

POLLOCK, C.B.—We are all of opinion that the words in the acts do not in any way alter the practice of this court as to staying proceedings in actions for so small a sum as this, and that we may still do as it has been the invariable practice of the court (*Kennard v. —*, 4 East, 495.)

Rule absolute.

COURT OF EXCHEQUER.

Easter Term, 1849.

(Before Mr. Baron ALDERSON, sitting alone in the Exchequer Chamber.)

CHAPMAN v. OPPENHEIM.

Certificate—Suggestion.

The judge or commissioner of the Sheriff's Court in London has no power to certify under the County Courts Act, sect. 129, that the action was fit to be brought in any of Her Majesty's Superior Courts of Record.

THIS was an action tried before the judge of the Sheriff's Court in London (Mr. Commissioner Bullock), and the question was whether he had power to certify as a judge, pursuant to the 9 & 10 Vict. c. 95, s. 129, (a) that the action was fit to be brought

(a) The section is as follows:—Sect. 129. "And be it enacted, that if any action shall be commenced after the passing of this act in any of Her Majesty's Superior Courts of Record for any cause other than those lastly hereinbefore specified, for which a plaint might have been entered in any court holden under this act, and a verdict shall be found for the plaintiff for a sum less than twenty pounds, if the said action is founded on contract, or less than ten pounds if it be founded on tort, the said plaintiff shall have judgment to recover such sum only, and no costs; and if a verdict shall not be found for the plaintiff, the defendant shall be entitled to his costs as between attorney and client, unless in either case the judge who shall try the cause shall certify on the back of the record that the action was fit to be brought in such Superior Court."

Superior Court under a writ of trial directed to him from the Superior Court; he had certified that the cause was a proper one to be tried in the Superior Court, and a rule having been made for leave to enter a suggestion on the roll to deprive the plaintiff of costs upon the ground that the action ought to have been tried in the County Court,

the plaintiff showed cause against the rule, and contended, that as the Commissioner here was treated in every respect as a judge; the rule differed from those in which it had been held that an under-sheriff had no power to certify.

contra.

MR. B. said he was clearly of opinion that the Commissioner had no power to give such a certificate, and therefore the writ should be discharged.

Rule discharged with costs.

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BAIL COURT.

Easter Term, 1849.

(Before COLERIDGE, J.)

SNOOK v. DORMAN AND ANOTHER.

Suggestion—Practice.

nisi to enter a suggestion to deprive a plaintiff of costs, because the amount recovered in an action of tort was less than 5l. under sect. 9 of the County Courts Act, must state upon what grounds it was made.

The rule nisi, in such a case, stated only that the verdict found for the plaintiff was less than 20l. it was held to be insufficient, and the rule was discharged with costs.

An action of tort had been brought in the Queen's Bench, and the jury returned a verdict for the plaintiff, damages 40s.

The plaintiff, on the part of the defendants, had obtained a rule for a suggestion upon the roll to deprive the plaintiff of costs, the amount recovered being less than 5l., and the County Courts Act, 1846, s. 9, enacting, that if any action shall be commenced in any of the Superior Courts for any cause (other than those specified) in which a plaintiff might have been entered in any court holden

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—
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under the Act, "and a verdict shall be found for the plaintiff sum less than 20*l.* if the said action is founded on contract or less than 5*l.* if it be founded on *tort*, the said plaintiff have judgment to recover such sum only and no costs." The *nisi*, as drawn up and served, called upon the plaintiff to cause why the defendants should not be at liberty to enter a suggestion upon the roll, "to deprive the plaintiff of his costs of action, the verdict found for the said plaintiff being for a less than 20*l.*, and for the recovery of which a plaint might have entered in the County Court, pursuant to the statute of 9 & 10 Vict. c. 95."

James now showed cause, and objected that the rule itself defective, as not showing any ground for a suggestion, it being ground for entering a suggestion upon an action of *tort* that verdict was for a sum less than 20*l.*, the act of Parliament depriving the plaintiff of his costs in such a case as the present only where the verdict is less than 5*l.*, about which the rule is silent.

Wordsworth, in support of the rule, admitted that the rule as drawn up was defective, but that he moved for and obtained it on the ground of the verdict being under 5*l.*, and that as this might have been an error in the rule office, he trusted the court would permit it to be amended.

COLERIDGE, J. thought that it was likely that there was some error whatever in the rule office, the brief probably being misindorsed in general terms, and that it was, at all events, the neglect of the attorney in serving such a defective rule, and in having it set right before acting upon it.

Rule discharged with costs.

BAIL COURT.

Hilary Term, 1849.

(Before ERLE, J.)

ELLIS v. PEACHEY.

Recovery of tenements—Jurisdiction.

Where the property itself is situated out of the jurisdiction of the County Court, proceedings cannot be taken there for the recovery of possession under sect. 122 of the County Courts Act, although both plaintiff and defendant are residing within the jurisdiction.

IN the County Court of Herefordshire a plaintiff had been heard to recover possession of certain lands under sect. 122. The land itself was situate out of the jurisdiction, but both plaintiff and defendant were resident within it. At the hearing, it was ruled that the court had not jurisdiction, but the objection was overruled and judgment given for the plaintiff. A warrant of possession had been issued, and this rule had been obtained to show why a writ of prohibition should not issue to the judge of the County Court to prohibit him from proceeding further in the case.

Naylor showed cause.—The point at issue here is, whether it is necessary to jurisdiction under this section, that the property should be within the district of the court. If the court should so hold, it would materially limit the construction of the act. Section expressly provides that “any summons, or other process, may be served out of the district of the court from which the same shall be issued.” The term, “other process” would embrace this proceeding for the recovery of tenements. By the 60th section, a summons may issue into any district in which the defendant dwells or carries on his business. The next section evidently contemplates that the defendant might not always be resident in this jurisdiction. The 123rd section, in relation to this process, enacts that the summons may be served personally, or by leaving it with some person at the place of abode of the party. How could this summons be served at the place of abode of the party holding over, except under the 61st section, which enacts that the bailiff of any other court may serve any summons or other process. Clearly, this could not be intended to apply to service where the tenement was situate. [ERLE, J.—Do you intend to say that a summons may be served in the district where the tenement is situate, or in that district where the defendant dwells?] The object of the section is to give

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jurisdiction in cases where the defendant is within the district. In *Winsor v. Dunford* (1 Cox & Macrae, 132), Patteson, J. says "the new County Courts differ from the ordinary inferior court in this, that jurisdiction attaches, not where the cause of action arises, but where the defendant is resident."

Lush, contra.—The question is rightly stated. The 61st section empowers service of process on the defendant by the bailiff of another court, but that means only serviceable process, such as a summons, &c. But this is not a question of service or of process, but of jurisdiction. The clause in the act relating to the recovery of possession of tenements is copied almost verbatim from 1 & 2 Vict. c. 74, which gives a similar jurisdiction to justices. This act merely transfers it from the justices to the County Courts. It is obvious, from the 123rd section, that the summons must be served where the premises are situate, no matter where defendant resides; for it enacts, that "if the place of abode of such person shall not be known, the posting of the summons on some conspicuous part of the premises so held over shall be deemed good service."

Cur. adv. vult.

JUDGMENT.—*February 24.*

WIGHTMAN, J., for ERLE, J.—Upon a motion for a prohibition, it appeared that the defendant resided within the jurisdiction of the Hertford County Court, but that the tenement of which possession was sought, was situated out of the jurisdiction, and that a judgment had been given for a warrant to the bailiff of the court to deliver possession. As the bailiff has no power to execute this warrant out of his own district, I am of opinion that the rule for a prohibition must be made absolute. The 122nd section authorizes the judge to issue a warrant to any bailiff of the court to give possession. A warrant under this section would have no force beyond the district of the court. With respect to warrants against the goods of a person, there is a power, by section 104, to transmit them to the high bailiff of other courts; but no power is given with respect to warrants for possession of tenements. It is not necessary to decide that the issue of a summons ought to be prohibited; but it is clear, that it is almost useless to proceed to judgment in a district where effective execution of such judgment cannot be had.

Rule absolute.

COURT OF COMMON PLEAS.

Trinity Term, 1849.

BESWICK v. CAPPER.

Abandoning excess—"Balance of account."

Plaintiff claimed from the defendant a sum of 227l. Against this he had credit by set-off for 116l. 16s. 9d., and a payment of 70l. Of this he abandoned 20l. 3s. 3d., so as to reduce his demand to 107l. 12s. 6d. thus to bring it within the jurisdiction of the County Court, and there for that sum:

Motion for a prohibition, that the case came within the principle of Hamms v. Newman (1 Cox & Macrae, 241), that the County Court had no jurisdiction.

The writ had been obtained by T. Jones, calling on the plaintiff to show cause why a writ of prohibition should not issue to the County Court of Staffordshire, restraining further proceedings on the ground that the County Court had no jurisdiction there.

Now showed cause against the rule.—This was an action in the County Court to recover 20l. on "balance of account." for 20l. The amount due to plaintiff on the full account

Against this he gave defendant credit for a set-off, 9d.; and for payment of 70l., making 186l. 16s. 9d., thus leaving to plaintiff the sum of 40l. 3s. 3d.; he abandoned 20l. of the excess over 20l., and thus, as he contended, brought his claim within the jurisdiction of the County Court. There was no

objection to the amount of set-off, which was entered in the plaintiff's demand thus: "Amount of bill delivered for beans, hay, 116l. 16s. 9d.;" the question was, whether plaintiff had credit, under the circumstances, for that amount, for the purpose of suing in the County Court. The ground on which the writ had been moved was, that there was the item of 116l. which the defendant did not here claim. [CRESSWELL, J.—The real ground for the motion is, that the plaintiff claims 227l.; and the question is, if so, has the County Court jurisdiction? The plaintiff is unwilling to allow against my claim by set-off, payment, or abandonment of excess, so much that my demand is only 20l."]

The plaintiff is compelling the defendant to take a set-off. It is his right to do that.]

It was referred to Laing v. Chatham (1 Camp. 252), and to the decision of 9 & 10 Vict. c. 95, giving the plaintiff power to sue for the excess over 20l. and thus to come within the jurisdiction of the

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crosses.*

the County Court. He also contended that, as there was dispute between the plaintiff and defendant as to the amount of 116*l*. (which, in a former action, defendant had claimed as delivered), this was like a case of "balanced account," and fore within the act: (*Woodhams v. Newman*, 13 L. T. 118.

WILDE, C. J.—The defendant nowhere admits the plaintiff's claim. By stating his own claim he does not admit the plaintiff's. *T. Jones* was not called on to reply.

WILDE, C. J.—It appears to me that this is not a case in which a prohibition can be refused. The question is, whether the County Court has jurisdiction to entertain questions involving an amount, where the result was to show that the sum due the plaintiff is below 20*l*. It could never have been the intention of the Legislature that such cases as these should be tried in the County Court, for what applies to the sum in this case would be applicable also where the account extended to thousands of pounds. It was an entirely different case where the parties met and settled their accounts, and quite beside the evil which would be created if the court should hold that the County Court had jurisdiction in such a matter as the present. It appears to me that this was never assented to by the defendant. There is no difference of principle between this case and that of *Woodhams v. Newman* decided in this court. The claim, therefore, not being one in which the County Court had jurisdiction, the rule must be refused for a prohibition.

COLTMAN, J.—I am of the same opinion. We decided this day, in the case referred to by my lord chief justice, that the jurisdiction of the County Court does not extend to cases where a larger sum than 20*l*. is actually in dispute. This rule must therefore be made absolute.

MAULE, J. was not in court.

CRESSWELL, J. concurred.

Rule absolute.

COURT OF EXCHEQUER.

Trinity Term, 1849.

SPOONER v. PAYNE.

*vent—Annuity—Construction of 1 & 2 Vict. c. 110, sect. 56.**had been an assistant commissioner of bankrupts, was awarded an annuity as a compensation on the abolition of the office. He subsequently became insolvent:**at the annuity passed over to the assignees under 1 & 2 Vict. c. 110, s. 56.*

It was a special case out of Chancery for the opinion of this court. It appeared that the defendant had for some time been a special commissioner of bankrupts, and on the abolition of the commissionerships he was awarded an annuity of 199*l.* as compensation, which annuity was to cease on his obtaining an appointment under government of equal value.

Subsequently to this the defendant became insolvent, and his assignees claimed the annuity.

The defendant, now contended—first, that the annuity passed by the general words of stat. 1 & 2 Vict. c. 110, that it was within the proviso of sect. 56 of 1 & 2 Vict. c. 110. See *Davies v. The Duke of Marlborough* (1 Swanst. 74); *Wells v. Wells* (8 M. & W. 149); *Stone v. Lidderdale and others* (2 Anst.

Churst, for the plaintiff, contended that the annuity passed by the general words of the act, and it is not excepted by the proviso in sect. 56 of 1 & 2 Vict. c. 110.

LOCK, C.B.—I think that this is not within the meaning of the proviso of the 56th sect. of 1 & 2 Vict. c. 110. The proviso refers to the Queen's service and that of the East India Company. This annuity is nothing more than a compensation given for the loss of certain emoluments to which the defendant was entitled. I think that the defendant was not in Her Majesty's service at all.

ERSON, ROLFE, and PLATT, B.B. concurred.

COURT OF EXCHEQUER.

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TINKLER v. HILDER.

*Judge's order—Jurisdiction—Interpleader.**A party who has acted upon a judge's order cannot afterwards apply to the court to set it aside.**Quere, whether a County Court judge has power, under the 9 & 10 Vict. c. 95, s. 118, to give compensation to third parties, not being parties to the suit?*

HAWKINS showed cause against a rule obtained in this court to set aside an order of Mr. Baron Parke, made at Maidstone on the 15th of March last. The question there came before a learned judge upon an interpleader motion, arising upon the 11th section of the County Courts Act (9 & 10 Vict. c. 95.) (a) The present defendant was the high bailiff of the County Court of Kent, and an execution having issued from that court, as in the nature of *a fi. fa.* to take the goods of a defendant, in a cause of *Chaplin v. Clark*, a warrant, on the 1st of December, was put into the hands of Henderson, the officer, to execute at Gravesend; he accordingly went to the house where the defendant in that action (Clark) resided, which was the house of the plaintiff, and seized certain goods under the warrant, believing them to be the goods of Clark. Some other person then set up a claim to those goods, and the parties went before the County Court judge, who decided against the claimant. The present plaintiff then made a similar application when that, after due inquiry, was likewise dismissed. The County Court judge said the plaintiff had no claim to the goods. If that were so, the officer had a right to enter, and he would

(a) The section is as follows.—Section 118. "And be it enacted, that if any claim shall be made to or in respect of any goods or chattels taken in execution under the process of any court holden under this act, or in respect of the proceeds or value thereof, by any landlord or by any person not being the party against whom such process has issued, it shall be lawful for the clerk of the court, upon application of the officer charged with the execution of such process, as well before as after any action brought against such officer, to issue a summons calling before the said court as well the party issuing such process as the party making such claim, and thereupon any action which shall have been brought in any of Her Majesty's Courts of Record, or in any local or inferior court, in respect of such claim, shall be stayed until the court in which such action shall have been brought, or any judge thereof, on proof of the truth of such summons, and that the goods and chattels were so taken in execution, may order the party bringing such action to pay the costs of all proceedings had upon such action after the issue of such summons out of the County Court; and the judge of the County Court shall adjudge upon such claim, and make such order between the parties in respect thereof, and of the costs of such proceedings, as to him shall seem fit, and such order shall be enforced in like manner as any order made in any suit brought in such court."

stified. [PLATT, B.—Suppose the doors are torn from top to bottom, and the house knocked to pieces? *Damage*, observe, is not mentioned in the 118th section at all. PARKE, B.—May not the claimant before the judge claim double compensation, and be entitled to receive it in such a case,—that is, in respect of the jury done to the house, and also for the taking of the goods?] The plaintiff stood by when the goods were taken, and went before the judge on the part of the other claimant. The present action was then brought, and an application having been made to Mr. Baron Parke, he, after hearing all the parties and the circumstances of the case, made the order in question, which is now sought to be set aside. That order was, that all proceedings be stayed on payment of costs. That order was drawn up and served, and an appointment to tax procured and attended by the plaintiff. The costs were accordingly taxed by the Master, and the amount, between 30*l.* and 40*l.*, paid to and received by the plaintiff, before a motion for the rule *nisi* in this case was made. The plaintiff did, therefore, acquiesce in the terms imposed by the order and adopted them; and having taxed the costs under that order, received and put the amount in his pocket, he comes afterwards to court to set aside the very order under which he has so acted. It is perfectly clear the plaintiff cannot do so: (*King v. Simmonds*, Q. B. 292; *Kinnaird v. Harris*, 2 B. & C. 801; *Pearce v. Chaplin*, L. J. 49.) [He was then stopped.]

Hansen, in support of the rule, was called upon by the court.—He receiving these costs does not prevent the plaintiff coming to court to set aside the order, because he would have been entitled to the costs in any event, supposing the order in question had not been made at all; the taking of them, therefore, upon the order, might not, it is submitted, to prejudice him. [PARKE, B.—You may have been entitled to that sum, and more at a future time, but not then; you could only receive that sum, in that way, and at that time, but under the order.] If the court entertain so strong an opinion against the plaintiff's motion upon this preliminary objection, it would be useless to go into the facts of the case generally, or argue the points further, although what has been said on the other side is not altogether correct.

POLLOCK, C.B.—I am of opinion that this rule should be discharged, and upon the ground that the party has adopted the order made by my brother Parke, which is now sought to be set aside. The costs were taxed upon that order by the interference of the plaintiff, and the amount to which he then became entitled was paid under it. The County Courts Act was intended to be a very beneficial act, passed to prevent any unnecessary expense and litigation; at the same time to obtain cheap and substantial justice. Where the statute is remedial, as here, it is our duty, as far as we can, to advance the remedy and suppress the grievance. A point has been incidentally raised to some extent upon the 118th section of the County Courts Act. It is not necessary now, however, to decide it; but at present I own I entertain a strong opinion

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upon the subject, in accordance with the suggestion thrown during the argument by my brother Platt, that where the owner of a house is a different person (here he was not) from him who owns the goods therein liable to be taken in execution, if any injury be done to that house, the party would have a special remedy for the damage. That opinion is certainly one which may, never be altered by any subsequent argument upon the point, and I do not now decide upon the point, because the present rule is now discharged, as the party seeking to rescind it had before something under it.

PARKE, B.—I am of the same opinion, that this rule should be discharged, as I have heard nothing that induces me to do so. The original order being correct. I thought when the matter came before me it was a very unjust action to be proceeded with. It would be very hard if such actions as these could be stopped, and it is competent for a judge of one of the Superior Courts to stay such an action.

ROLFE, B.—If other orders made under the Interpleader Acts were adopted and acted upon as the present order has been, they may be all used and afterwards treated as such. This is the usual and common order, that on payment of costs the proceedings be stayed. The order has been acquiesced in, taxed and paid, and now the plaintiff comes to the court to set aside that order. Such a thing was never heard of.

PLATT, B.—The rule must be discharged. Even in an action of trespass, where the judge had no power to stay the proceedings, if both parties came before him, stated their case, agreed to abide the decision, and the order is made, which they act upon, they are bound by it. Here they went before the Master to tax the costs and having ascertained the amount to be paid under the rule, they received it. I must, however, differ (not without very great doubt of the correctness of my own opinion, from the weight and authority of the authority against me), upon the point which has been suggested upon section 118 of the County Courts Act, and I think the party would clearly have his remedy by action for such an injury as has been mentioned. It is true, that here the owner of the house and the owner of the goods is the same person; but suppose the house and the goods belonged to several parties, and the order to take the goods, broke the doors, tore down the premises and committed an aggravated trespass, is there any power given by this statute to the County Court Judge to award compensation for damages? The Judge may adjudicate between the parties, the parties before him in the suit, but not between third parties. The words of the 118th section appear to me to be "that if any claim shall be made to, or in respect of, any goods or chattels taken in execution under the process of any court under this act, or in respect of the proceeds or value thereof, or any landlord for rent, or by any person not being the party to whom such process has issued, it shall be lawful for the clerk of the court, upon application of the officer charged with the execution of the process, to issue a writ of prohibition to the court, to prohibit the officer from executing the process."

process, as well before as after any action brought against
icer, to issue a summons calling before the court as well
y issuing such process as the party making such claim, and
on any action which shall have been brought in any of Her
's Superior Courts of Record, or in any local or inferior
1 respect of such claim, shall be stayed; and the court in
ich action shall have been brought, or any judge thereof,
f of the issue of such summons, and that the goods
ttels were so taken in execution, may order the party
; such action to pay the costs of all proceedings had upon
ion after the issue of such summons out of the County
and the judge of the County Court shall adjudicate upon
ims, and make such order between the parties in respect
and of the costs of the proceedings, as to him shall seem
such order shall be enforced in like manner as any order
any suit brought in such court." It seems to me the judge
ower to direct compensation but between parties to the
d surely if an otherwise disinterested person's house be
to pieces, he is not to be without remedy.

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Judge's order—

Jurisdiction—

Interpleader.

Rule discharged with costs.

COURT OF EXCHEQUER.

Trinity Term, 1849.

ORGILL v. STINSON.

City of London Small Debts Act—Suggestion—Affidavit.

*icient that the affidavit on which a rule is moved to enter a sug-
on the record to deprive the plaintiff of costs states that part
cause of action arose in one part of the city and another part in
r, without stating expressly that the whole debt arose within
r.*

LE having been obtained in this case to show cause why
suggestion should not be entered upon the roll to deprive
tiff of costs under the London Small Debts Act (10 & 11
lxxi.),

iker showed cause.—The affidavit is made by the defen-
self, who states that the cause of action arose partly in

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—
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London-wall and partly in Fleet-street; but it is submitted he ought to have shown that the whole of the work was done within the city. This act differs from the general County Courts Act, which says that it shall be sufficient if any material part arose within the jurisdiction. (He referred to 1 Saund. 74, *a*.)

ALDERSON, B.—The affidavit states that part arose in one part of the city, and another part in some other part of the city. That is enough *prima facie* to enter a suggestion. If the whole did arise within the proper jurisdiction, you can set up that in answer to the suggestion.

The rest of the COURT concurred.

G. Pollock, contra, was not heard.

Rule absolute.

BAIL COURT.

Easter Term, 1849.

(Before COLERIDGE, J.)

TENNISON v. MORTIMER.

Suggestion—Affidavit.

In an affidavit to enter a suggestion it is sufficient to state that the cause of action arose within the jurisdiction of the Court, without specifying where or in what manner the cause of action arose.

THIS was an action tried before the under-sheriff, when a verdict was returned for the plaintiff for 6*l.* and upwards. Subsequently a rule *nisi* was obtained to enter a suggestion upon the roll to deprive the plaintiff of costs, under the 9 & 10 Vict. c. 95. The affidavit upon which the motion was made stated that the defendant resided at 4, Albany-court-yard, Piccadilly, and within the jurisdiction of the Westminster County Court; and also that the plaintiff dwelt within the said jurisdiction, and within half a mile of the defendant; “and that the whole cause of action accrued within the jurisdiction of the said County Court,” &c.

Hawkins showed cause, and contended that the affidavit was insufficient in not setting out in what way, or where, within the jurisdiction, the cause of action arose, citing *Peterson v. Davies*, 1 Cox & Macrae, 148.

d, in support of the rule, contended that the affidavit contrary necessary allegation.

Cur. adv. vult.

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Suggestion—
Affidavit.

JUDGMENT.—*May 24.*

JUDGE, J.—In this case a rule for entering a suggestion under the County Courts Act had been obtained, as resisted, on the ground of the insufficiency of the affidavit as to the description of residence. The defendant alleged residence to be 4, Albany-court-yard, Piccadilly, and sought the jurisdiction of the County Court, and that the cause of action was wholly within that jurisdiction, and the plaintiff might have entered in that court; that the plaintiff did not dwell more than twenty miles from it, and within the jurisdiction, and not more than from the defendant's residence. It was contended that the affidavit was defective, for not showing that the plaintiff was within the jurisdiction of the court in which the cause of action arose; and that *Davis* (1 Cox & Macrae, 148) was relied upon. That case was distinguished on this ground; there the party stated his place of business to be 133, Fenchurch-street, and his dwelling in the city of London, and it was said that he did not give sufficient information as to where his dwelling was; and the rule was laid down by the Lord Chief Justice very well, that the party was bound to give sufficient and reasonable information as to the other party where his place of residence was. I should be carrying that case much further to extend it to cases arising within the jurisdiction of the court is to pursue the form: wherever it is necessary to state such a circumstance, it seems to give all the information that is necessary. It is extremely difficult to state at what precise number of house, or at what precise street, the whole cause of action arose. It is to say, after having given the residence of both parties, that the cause of action arose within the jurisdiction of the court. The rule, therefore, will be made

Rule absolute.

BAIL COURT.

Hilary Term, 1849.

WOOD AND OTHERS v. CLUTTERBUCK.

Suggestion—Affidavit.

It is not sufficient for an affidavit for a suggestion merely to state cause of action arose within the jurisdiction of the court, but facie case for a suggestion must be made out.

Therefore, where the affidavit stated that the orders for the goods were written at K. which is within the jurisdiction of the Court of B.; and a counter affidavit stated, that though written the orders were delivered out of, the jurisdiction;

Held, to be insufficient, as no cause of action arose until the orders were delivered.

THIS was a motion for leave to enter a suggestion on the roll to deprive the plaintiff of costs. The act for goods sold and delivered, and at the trial the plaintiffs obtained a verdict for less than 20*l*. The affidavit, after negating exceptions in section 128 of the 9 & 10 Vict. c. 95, and stating that a material part of the said cause of action arose within the jurisdiction of the County Court of Brompton, stated, "that the orders for the goods were written by this deponent at the Kensington (London) Warehouse, which is in the district of the County Court of Brompton." On showing cause an affidavit was produced, negating the fact that any part of the cause of action having arisen within the jurisdiction of the said County Court.

Corrie showed cause, and contended that the affidavit upon which the rule was obtained was insufficient, inasmuch as it merely stated that the orders were *written*, not that they were *given* within the jurisdiction, and therefore showed no cause of action within the jurisdiction; he relied also upon his own affidavit as negating the fact of exclusive jurisdiction in the County Court: (*Wood v. 1 Cox & Macrae*, 208.)

Huddlestone, contra, contended that as the affidavit stated that a material part of the cause of action arose within the jurisdiction of the County Court, it was sufficient, and this court would grant the rule upon affidavit, but would leave the plaintiff to traverse the fact upon the suggestion: (*Tennison v. Mortimer*, 1 Cox & Macrae, 250; *Butler v. Coney*, 1 Cox & Macrae, 141.)

WIGHTMAN, J.—In practice it has always been necessary to show such an application as this should be founded upon an affidavit showing sufficient grounds for believing that the cause of action arose within the jurisdiction of the County Court. If a difference exists between the affidavits on each

in respect, the court will not try the fact, but leave the party to averse the suggestion. But in all cases it is necessary that a *prima facie* case should be made out for the suggestion, and, in the present case, it is said that such a *prima facie* case is made out. In the first case, it is said that the single allegation that the cause of action arose within the jurisdiction is sufficient. But it seems to me that such an allegation is not enough, for, if it were so, a simple statement to that effect would be all that would be required, and upon that principle a party might come and obtain a rule absolute in the first instance. Here, however, there are additional facts stated, and it is said that the orders for the goods were written at the Kensington Gravel-pits, which is in the district of the County Court of Brompton, and that allegation is not denied: but it is said in answer, that although the orders were *written* within the jurisdiction, the goods were, in fact, *delivered* out of the jurisdiction. Now, as no cause of action arose until the goods were delivered, and as it is sworn that they were delivered out of the jurisdiction, I think the rule must be discharged.

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—
Suggestion—
Affidavit.

Rule discharged.

COURT OF EXCHEQUER.

Trinity Term, 1849.

FOWLER v. GOLDNEY.

Certiorari.

Certiorari will be granted, on the ground that a jury had been applied for, and that a fair trial could not be had in the County Court by a jury from the locality.

Does the 90th section of the County Courts Act repeal the previous acts, 19 Geo. 3, c. 70, and 7 & 8 Geo. 4, c. 71, as to giving recognizances, Quere?

JUDGES moved in this case for a rule to show cause why the writ of *certiorari* obtained herein should not be quashed. An action of *tort* had been brought in the County Court of Wiltshire, a distress made on some goods at Melksham. A jury had been applied for, and notice thereof given on the 30th of April. In the affidavits used on application for the writ, it was alleged that the defendant could not have a fair trial by a Melksham jury; the affidavits now produced in answer wholly contradict the statements made on the other side, and the material facts there alleged. The writ was obtained upon an *ex parte* statement to a learned judge

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—
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at chambers, under the County Courts Act (9 & 10 Vict. s. 90), which enacts that "no plaint entered in any court under this act shall be removed or removable from the said into any of Her Majesty's Superior Courts of Record, by any writ or process, unless the debt or damage claimed shall exceed 5*l.* then only by leave of a judge of one of the Superior Courts of Record, and upon such terms as to payment of costs, or such other terms, as the judge shall think fit." [ALDERSON, B.—Would you consent to try it in the County Court? That is the best way of trying it. I should think there would be no objection to that course. It is, however, submitted, that as the defendant is removing the case, he should enter into recognizances, pursuant to the terms of 19 C. 70, and 7 & 8 Geo. 4, c. 71. The 90th section of the County Courts Act does not repeal those previous acts as to the giving of recognizance, but merely imposes such other terms as a judge shall think fit. [ALDERSON, B.—But if it is wholly in the discretion of the judge, is it not, in effect, a getting rid of the recognizance? It is submitted that these acts may all well stand together, that being so, the former would not be repealed by express repeal in the latter, which is not the case here; there is also another point, which is, that the affidavit on which the writ was obtained was entitled in this court and in the cause; there was the cause in this court, and the affidavit should have been entitled in the court only: (see *Collier v. Love*, 11 L. T. 107.)

Rule nisi, in the alternative, unless parties consent to try by the judge. (a)

(a) This case was not mentioned again.

NISI PRIUS.

Sittings in Middlesex after Trinity Term, 1849.

(Before Mr. Justice ERLE.)

POLLETT v. RYLEY.

Libel by an officer of the Court.

*tion will lie against a clerk of a County Court for publishing a
r, stating that a defendant in the Court had not been committed for
imple debt, but for recovery of sums of money he had embezzled
n his master. But the damages were nominal, and the judge
used to certify.*

THIS was an action to recover compensation in damages for
injury alleged to have been sustained by means of the pub-
lication of a libel by the defendant, the clerk to the Whitechapel
Court.

The defendant pleaded not guilty, and a justification.

Malley (with whom was Clarke), appeared for the plaintiff;

J. H. Watson and Manisty, for the defendant.

It appeared that the plaintiff, who was represented as being an
and very poor man, had, in the course of last year, been
in the Whitechapel Court by a person of the name of Rid-
don, for the sum of 1l. 19s., when Mr. Serjeant Manning, the
of that court, adjudged that the present plaintiff should pay
a month, and 19s. with the costs, at the expiration of another
1. The defendant was not able to meet the first instalment,
whereupon an order was made by the learned judge, under the
County Courts Act, for his committal to the House of Correction,
Fulham-fields, for five days. Upon his entrance into the prison,
during his residence there, he was subjected to the ordinary
treatment, greatly to his annoyance, and on his release he
gave a description of his case, and of what he suffered, and put
an appeal to the public. The result of this appeal was, that
contributions to some amount were given. The attorney for the
plaintiff then addressed a letter to the COUNTY COURTS CHRO-
NICLE, complaining of the practice of the County Courts, and
cited the case of the present plaintiff as an illustration. This letter
attracted the attention of the defendant, who is the clerk to the
Whitechapel Court, and he thereupon wrote a letter to the same
newspaper in reply to the statement which the attorney had put forth,
offering arguments in support of the opposite side of the ques-

The defendant's letter also went on to state that the

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punishment the present plaintiff had undergone was not the the court, but, in fact, the effect of the act of Parliament, rendered such a course of proceeding imperative; and further that, in truth, the plaintiff had not been committed for a debt, because he had been sued by his employer for the re of sums of money which he had received for him, but which embezzled; and that, in his opinion, the contributions whi been made for him would not have been so made had the been aware of the real nature of the plaintiff's case. This v substance of the libel complained of, and an action was now b for compensation. The case for the plaintiff having been con

Watson addressed the jury on the part of the defendar contended that this was clearly what was termed an att action, and remarked that, like many other members of th profession, that individual had doubtless been deprived of n the golden pickings which he had enjoyed prior to the establi of the County Courts; and therefore it was that he had i instance given vent to his venom against them. He sub too, that the letter written by the defendant was a comm only on the statements contained in the letter of the attorne

ERLE, J. summed up.

The jury, after some consultation, gave a verdict for the tiff—Damages, 20s. The judge refused to certify.

COURT OF QUEEN'S BENCH.

Trinity Term, 1849.

WALLEY v. M'CONNELL.

County Court—Service by mistake on a wrong party.

*of trespass for false imprisonment, the defendant pleaded
tion under process out of a County Court in a suit there by
ant against the plaintiff. It was proved that the defendant,
debt due from one W. I., sent a bill by a messenger, who, by
elivered it to the plaintiff. A plaint was afterwards entered
nty Court against W. I., by name, and a summons issued
7. I. by name; but that summons was also served upon the*

*Upon proof of service, judgment was obtained ex parte
V. I. by name, and afterwards another judgment summons
' against W. I., by name, and on non-appearance an order
for committal of W. I., by name. All the proceedings were
in the plaintiff (who throughout informed those who served
e was not W. I.) by direction of defendant.*

*e plea was not proved, inasmuch as the process had been
the defendant against W. I., and the allegation that the
issued the summons against the plaintiff was material, and
try to the fact.*

*at as the process had been executed against the plaintiff by
f the defendant, he was responsible in trespass.*

ISS.—For false imprisonment.

(inter alia).—1st. Not guilty. 2nd. Leave and license. Plea.

*ial plea of justification, that before the trespass, and
tute 9 & 10 Vict. c. 95, a County Court was duly con-
e holden at Liverpool, and was there held, and that the
used to be entered a plaint, in writing, in the said
rt, against the now plaintiff, &c., and sued out a sum-
t the now plaintiff, who was then resident within the
&c., and, in and by the summons, the now plaintiff
ned to appear in the said County Court, on, &c., to
ow defendant in an action for goods sold and delivered
defendant to him, &c., and to take notice that, in case
ave been previously served with the said summons, an
night be made, immediately after judgment should have
d against him, to commit him to prison, in which case*

*the said court would proceed to hear and determine
tion, and make such order thereupon as he should
ether he, the now plaintiff, should be then present or
e defendant further said, that the said summons issued
d demand over which the County Court had jurisdic-*

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tion: and the defendant further said, that the said summons duly served personally upon the now plaintiff, &c., as it was before the cause was to be tried as were directed by the rules, and that the summons had the substance of the action on which it was issued, &c., and that the title to corporeal hereditaments was in issue, &c.: and the defendant further said, that on the day when the now plaintiff did not appear in obedience to the said summons, but that the now defendant did appear, and the judge presided at the hearing and trial of the said cause, and it was adjudged that the now defendant should recover, &c., and it was ordered by the court that the debt and costs should be paid by instalments; and the now defendant afterwards sued out a minute and memorial in writing, of the same judgment and order: and the defendant further said, that the said minute of the said judgment and order was then served on the now plaintiff personally, and afterwards on any of the last-mentioned instalments, or any part thereof, which had been paid or satisfied, the now defendant obtained a writ from the said County Court, whereby the now plaintiff was summoned to appear on, &c., to be examined by the jury touching his, the now plaintiff's, estate and effects, and the facts and circumstances under which he contracted the said debt, and that he was the subject of the action, &c., and as to the means and conditions, &c.; and the now plaintiff was thereby to take notice that if he did not appear, he might, by order of the County Court, be committed to the common gaol: and the defendant further said, that afterwards, and after the date and issuing of the said mentioned summons, the said last-mentioned summons was served personally upon the now plaintiff: and the defendant further said, that, on the day in the said last-mentioned summons named, the said now plaintiff did not appear, whereupon the court, &c., ordered that the now plaintiff should be committed for fourteen days to the house of correction; whereupon, and for the purpose of putting the said order into effect, heretofore, and whilst the said order remained in full force, &c., the clerk of the County Court, under the seal of the court, a warrant of commitment, directed to take the now plaintiff, &c.; and the said warrant was delivered, &c., and under and by virtue of it the now plaintiff was seized and apprehended, &c.; which are the trespasses, &c., and the defendant's replication, *de injuriâ*.

At the trial, which took place before Erle, J. at the Summer Assizes of 1848, it appeared that the now plaintiff, named Ireland, being indebted to the now defendant, a bill of exchange on the demand, was delivered by the defendant's messenger to the now plaintiff by mistake; that the defendant obtained a writ against Ireland in the County Court, which the same was served upon the plaintiff, insisting that the plaintiff was indebted to him, although the plaintiff, on that and all other occasions, was innocent of his mistake. Upon the return of the summons, the now defendant in the County Court not appearing, judgment was given against him, and the debt ordered to be paid. Upon nonpay-

uant to that judgment, application was made to the judge of the County Court for a summons, calling upon Ireland to show cause why he should not be committed to prison; which application was granted. That summons was also served upon the plaintiff, and upon disobedience to that summons, a warrant of commitment against Ireland was issued, with which defendant accompanied the officer to the place where plaintiff was working, and although he protested he was not Ireland, and his fellow-workmen warned defendant of the mistake, he persisted in directing the officer to take him into custody. Under the direction of the judge, the jury found a verdict for the plaintiff, but leave was reserved to move the court to enter it for the defendant upon both issues. Accordingly in the following term a rule *nisi* to enter the verdict for the defendant, or for a new trial, was obtained; against which

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—
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Crompton and Cowling (Wednesday, June 13,) showed cause.—

As to the issue upon not guilty the verdict is clearly right. It is said that the learned judge at the trial was wrong in describing the warrant of commitment issued by the judge of the County Court as a writ of execution, instead of a proceeding *in pœnam*, and that therefore there ought to be a new trial; but sect. 110 gives the judge power to order the discharge of the party imprisoned; and for some purposes it certainly appears to be a writ of execution, though of an anomalous character. (They referred to sects. 98 and 99 of the County Courts Act.) *Ex parte Kinning* (1 Cox & Macrae, 1), was decided on a different statute. But that question is not material in this case, for it is clear that the defendant, if he had chosen to interfere, might have prevented the plaintiff's imprisonment; and at all events it was the defendant's wrongful act that placed him in the situation which subjected him to imprisonment: (*Thompson v. Gibson*, 7 Mee. & W. 456, per Parke, B.) COLERIDGE, J.—The case of *Lock v. Ashton* (18 L. J. 76, Q. B.), is more in point, where the plaintiff, being illegally taken by the defendant before a magistrate, who adjourned the hearing several times, it was held that defendant was not liable for any part of the imprisonment after the first adjournment. ERLE, J.—As I understand that case, the decision depended on the question whether the adjournments were ordered by the magistrate of his own accord or suggested by the prosecutor.] 2. The plea of justification was not proved, for the present plaintiff was not, but Ireland was, the defendant in the county court. The defendant supposed that he was suing Ireland. Mesne process against the wrong person has always been held bad; and, in this case, if the first writ was bad, the whole proceeding fails. A plea of justification under process of an inferior court or under mesne process must show all the proceedings from the commencement: (Com. Dig. "Pleader," 3 M. 24; *Doe v. Permiter*, 2 Lev. 81.) In *Cole v. Henderson* (6 T. R. 234), a writ of summons against Richard Cole was served on Aquila Cole, who did not appear, whereupon a *distringas* issued against Richard, which was executed on the goods of Aquila. In an action by Aquila, there were averments in the plea, that the first writ issued against Aquila by

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wrong party.

the name of Richard, and that Richard, in the writ of *distress*, meant Aquila. But, upon demurrer, it was held that the sheriff was not justified; the writs appeared to be against Richard, and against him, therefore, they ought to have been executed; the allegation that they were intended to be against Aquila made no difference, because Aquila was not bound to notice that intention and it was not shown that he had done anything to estop himself from taking the objection. So, in *Shadgett v. Clipson* (8 East, 324), which was also on demurrer, it was held that the defendant could not justify an assault and imprisonment of A. B. by showing that the writ was against C. D., and averring that it was issued against A. B. by the name of C. D., and that they were one and the same person. "Process ought regularly to describe the party against whom it is meant to be issued; and the arrest of one person cannot be justified under a writ sued out against another." In *Fine v. Cochen and others* (2 C. M. & R. 196), the declaration alleged that the plaintiff sued a writ of *capias* out of the Exchequer against the defendant, William Cocken, by the name of William Cocker, which was delivered to the sheriff, who thereupon arrested the defendant, William Cocken, and, he being so arrested, the other defendants executed a bail bond, &c. It was held, in answer to judgment, that the declaration was ill, for that the validity of the bail bond depended upon the legality of the arrest, and it was clearly illegal. "Were the law such as is contended for on behalf of the defendants, it might justify the sheriff in the execution of the writ in which no name whatever is mentioned." Per Parke, B.:—"Do you mean to say that a man is bound to obey any warrant? You might make general warrants lawful by inserting the name of John Doe." Per Lord Abinger, C. B.:—"In *Re Thurbane* (Hard 323), a commission of rebellion issued against one Thurbane, and one Green appeared before the commissioners, and affirmed himself to be the person, whereupon they apprehended him by virtue of their commission, but he made resistance, and snatched the commission from them, and tore it in pieces. Upon affidavit made in this matter, an attachment was prayed against Green. Hale, C. B.:—"If a wrong man be taken, though he affirm himself to be the person against whom the commission is awarded, yet, the commissioners having no warrant to take him by their commission, his affirming himself to be the person will not excuse them in false imprisonment, as has been held upon the executing of a *capias*. In *Freeman v. Cook* (18 L. J. 114, Ex.), the case *Coote v. Lighthorn* (F. Moo. 457), was quoted. In that case Coote brought false imprisonment against Lighthorn, who justified, for that he, having a warrant to arrest J. David, asked Coote what was his name, and answered that his name was J. David; *per quod* he arrested him. The plaintiff demurred, and it was adjudged for the plaintiff; for the defendant ought at his peril to have taken notice of the party named in the warrant. Parke, B., said, "the case in Moore is sanctioned Com. Dig. 'Imprisonment,' L. 2; and it always has been the opinion of the judges that it is law." So in *Crawford v. Satchwell* (2 Str. 1218),

person had been proceeded against in a former action, wrong name. The fault would have been fatal in that action, according to the judgment, if the plaintiff had persisted himself from saying that he had been sued in that action by a name not properly applicable to him. The plaintiff was not the party meant; and even if he had been not the party described in the plaint. In *Jarmain v. M. & G.* 827), it was held that the party must not only be described in the writ, but he must also be the party arrested. [COLERIDGE, J.—The principle will probably be put; but it will be argued that the plaintiff has so conducted himself as to give the defendant the right to say that he was intended.] The plaintiff never represented that he was not entitled to notice of the process; and he was entitled to *Reeman v. Cooke* (18 L. J. 114, 117, Ex., per Parke, B.); *Magnay* (5 M. & G. 778), is distinguishable. (They also see *Crawford v. Satchwell*, 2 Stra. 1218; and to sects. 59 of the County Courts Act; Hardres, 223, and 1 Saund. 89.)

Q. C., and *Atherton*, in support of the rule.—*Finch v. Cole v. Hindson*, and the other cases cited, were decided on the distinction between mesne and final process; which is: “upon the former the defendant has a right to insist and sue by his real name; but if, when sued in a different mode, he omits to take his objection in the mode pointed out by the law, he quiesces in being sued by that name, and cannot afterwards retract his admission.” (Per Cresswell, J., in *Fisher v.*

Against whom did the defendant intend to proceed in that Court? Against the person served with process. The real person sued by a wrong name, should have objected in proper form;—if not the debtor, then he has defended the suit. The defendant clearly meant to sue against the plaintiff, when the judgment summons was issued; he must have meant to proceed against the man against whom he had recovered the judgment. The effect of a judgment summons in a County Court, which is a court of record, is the same as the effect of a judgment in a Superior Court. The party against whom the judgment has been obtained is liable to final execution; and *Magnay* shows that a man may be liable, though he has sued under a wrong name. At all events, the defendant is liable for the imprisonment. The proceedings upon the judgment summons are not so much in the nature of execution as imprisonment. [ERLE, J.—I told the jury that I thought the defendant could have procured the plaintiff's discharge if he liked. I told them that, while the plaintiff was in custody, the writ was applied to by the officers of the Court, and told of the writ, and requested to interfere, but seemed rather to insist on keeping him in prison.] The only mode of getting discharged is by paying the money. (They referred to sects. 98, 99, 103, and 104 of the County Courts Act, 9 & 10 Vict. c. 95.)

Cur. adv. vult.

WALLEY
v.
M'CONNELL.
—
Trespass—
Service of
process on
wrong party.

WALLEY
v.
M'CONNELL.

Trespass—
Service of
process on
wrong party.

JUDGMENT.—*July 5.*

ERLE, J.—This was an action of trespass and false imprisonment: the plea justified under process out of a County Court suit there by the now defendant against the now plaintiff. The question has been whether the plea was proved. The evidence in support thereof was, that the defendant, having a debt due from Ireland, sent in a bill by a messenger, who delivered it to Whalley by mistake, believing him to be Ireland, and the defendant then issued a summons out of the County Court against Ireland, intending to issue it against him as his debtor; the summons was served on Whalley, the plaintiff, under the direction of the same messenger, who insisted there was no mistake in the plaintiff being called Ireland. Upon the usual proof of service of the summons, judgment was obtained against Ireland, and a second summons and a *capias* were issued against them being against Ireland by name, and all of them served upon the plaintiff. Throughout these proceedings the plaintiff uniformly stated he was not Ireland, and informed the messenger who served him of their mistake. On these facts we are of opinion the plea is not proved. The allegation that the defendant issued the summons against the plaintiff is not true; it was issued against another man by his proper name and intended by the defendant to be against him, and served upon the plaintiff only by reason of a mistaken supposition that he was the debtor. Whatever there may be in the argument raised as to the proper course to be pursued by one who is wrongly served with process in an action not being the intended defendant, the allegation in question is material, and indeed it is the foundation of the plea, and if the foundation falling, the superstructure falls also; and the distinction between mesne process and final process does not arise in this case as Whalley never became the defendant, and never held out as Ireland. Upon this ground we distinguish the present case from that of *Fisher v. Magnay*. It was stated that the defendant, Fisher, there, notwithstanding the misnomer, assumed to be the defendant in the first action; and if, though not defendant in the first action, he is to be concluded from denying that he is the defendant, final process may be valid, though not against him by his real name, but by the name that he must be taken to have assumed. Whatever be the nature of the exception upon the summons, it was clear it was moved for by the defendant, and executed against the present plaintiff under his direction; the defendant is therefore responsible for the wrongful imprisonment under it, and must be discharged.

Rule discharged.

COURT OF QUEEN'S BENCH.

Trinity Term, 1849.

REG. v. PARHAM.

Appointment of Judge.

d Chancellor is empowered to appoint the same person to be the of one or more County Courts, under the County Courts Act, holden in several districts; and a single appointment, enumerating tricts of which the appointee is to be judge, is sufficient.

information in the nature of a *quo warranto* had been issued for the purpose of raising the question of the validity of the appointment of the defendant to be the judge of the County of Herefordshire and Worcestershire, holden in twelve districts, several of which were in either county. The defendant had been duly constituted under the statute, and the sub-question was, whether the act of Parliament required that there should be a different judge for every district formed under the provisions of the act. The defendant had not a separate appointment for each court, but a single appointment enumerated the districts over which he has to preside.

Kelly (with him *Godson* and *Mellish*), for the crown.

Attorney-General (with him *Phipson*), for the defendant.

unnecessary to repeat the arguments, as the question again arise.]

Cur. adv. vult.

July 5.

DENMAN, C. J., delivered the judgment of the court.— Judgment.

demurrer to a plea of *quo warranto*, a most important question arises as to the construction of the recent statute

(*Vict. c. 95*), namely, whether the same person may be appointed a judge of the County Court formed to be holden in several districts, or whether it is necessary that the appointment of each judge should limit his authority to one district.

The second section enables Her Majesty to divide the county of any county into districts, and to order that a County Court shall be holden in each of such districts, and to make orders from time to time, and to order that any part of one county shall be within the jurisdiction of the County Court of another county. The 3rd section enacts, that there shall be a judge for each district to be created under this act, and that the County Court may be holden simultaneously in all or any of such districts. The 9th section enacts that the Lord Chancellor shall

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appoint as many fit persons as are needed to be judges of the County Court under this act. These are the sections on which the question turns, for the true construction of which illustrations and arguments are drawn from many other sections of the act. No doubt can be entertained that the jurisdiction of a judge may, by his appointment, be limited to one district, and there may be many judges of the same County Court having joint nor co-ordinate jurisdiction; and it was to meet such a case that the latter part of the 3rd section provided for holding the County Court simultaneously in all or any of the districts. The part of the section was necessary to meet the case of several judges being appointed to the same County Court; but it by no means involves the proposition that they must be so appointed, nor do the words "there shall be a judge for each district" necessarily import any such proposition, but only that the judge who shall hold a County Court in each district shall be appointed to that district, so that there shall not be two or more judges for the same County Court who may hold a court in any given district. The 9th section, giving to the Lord Chancellor the appointment of as many fit persons as are needed to be judges of the County Court, although it has no words specifically giving a discretion to the Lord Chancellor to determine how many are needed, yet seems much more consistent with the intended exercise of such a discretion than with the supposition that as many judges may be needed as there are districts created by the crown. Now, if the Legislature had intended that the Lord Chancellor should have no discretion as to the number of judges to be appointed, he should be bound to appoint different persons to be judges for the several districts, and to limit their jurisdiction accordingly, certainly some more restrictive language would have been used. There is nothing contrary to the general rules of law in the appointment of the same person to hold several offices which are distinct and independent of each other, and the duties of which are not inconsistent. And the offices of judges of the County Courts can be so held in several districts, because in their case both these conditions are plainly satisfied. Such appointment, therefore, will be good, unless it is prohibited by the statute in question. There are no words in the statute directly prohibiting such appointment, nor can we, after a careful perusal of the different clauses, find any inconsistent with the validity of such appointment. It is true there are many provisions which appear to contemplate the jurisdiction being confined to one district; thus the word "district" is used in the singular number throughout. But we must bear in mind that the jurisdiction *may* be so limited, and the provisions alluded to were necessary in the event of its being limited. The question here is whether the jurisdiction *must* be limited. The only section which appears to contain such a limit is the 12th, which gives the county clerk of Middlesex the right to select the district in that county for which he shall be entitled to be appointed judge. That right, however, is in the nature

nsation, and stands on its own particular grounds. The appointment of the defendant, as set out in the plea, expressly several districts in which he is to hold the County Court, not open to any objection on account of generality: it is as usual as if there had been several appointments, one for each district. It undoubtedly appoints the defendant to be judge of the County Court of Hereford as well as of Worcester, but specifies the district of each court in which he is to hold the court, and it is not, as is contended in the argument, an attempt to place any part of the one county within the jurisdiction of the County Court of the other, or to constitute any place in one to be part of a district in the other, which cannot be done by the Lord Chancellor, or by Her Majesty in Council. On the whole, therefore, we are of opinion that the appointment of the defendant is well made under the provisions of the statute in question, and our judgment is in favour of the defendant in this case.

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Judgment for the defendant.

COURT OF QUEEN'S BENCH.

Trinity Term, 1849.

REG. v. DYER.

High Bailiff—Appointment of.

competent for the Queen in Council by order, under sect. 5, absolutely to abolish any court mentioned in schedules A. or B. of the County Court Act, and in case of any such court being so abolished, the high bailiff has no claim under sect. 34 of the statute to be the high bailiff of a county court established in the same place in substitution for the local court so abolished.

THIS was an information, in the nature of a *quo warranto*, to which there was a plea and a replication, which was demurred. The question raised was as to the right of the relator (one Dyer) to be first high bailiff for the County Court of Worcester, he having held the office of beadle of the Kidderminster Small Debts Court, established under 12 Geo. 4. c. 126, the duties of which were analogous to those of a high bailiff of a County Court. There were two orders in council on the same date (March 13th, 1847.) By the former, the Kidderminster Small Debts Court was abolished; by the second, it was provided that the statute 9 & 10 Vict. c. 95, should be put in force

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in the county of Worcester, and that Kidderminster should be divided into two districts. The rest of the case is sufficiently explained by the judgment.

H. Hill (with him *Talfourd*, Serjt.), in support of the demand, said that *Sir F. Kelly* (with him *Godson* and *Mellish*), for the crown, was unnecessary, in this case also, to give the arguments, as the question cannot again arise.

Cur. adv. t.

Thursday, July 5.

LORD DENMAN, C. J., delivered the judgment of the court. The only question in this case is, whether the Worcester County Court, held for the district of Kidderminster under statute 9 & 10 Vict. c. 95, is the same court as that held for the borough of Kidderminster under the statute 12 Geo. 3, c. 76, and that depends on whether the Queen had power, under the 34th section of the late act, to abolish the former court, and whether she has, in fact, abolished it; for, if so, then the new court is not the same court held as the County Court within the meaning of the 34th section of the late act, and the prosecutor is not entitled to be the high bailiff of it, and must apply for compensation for the loss of his office under the 38th section. The information in this case states an Order in Council of the 13th of March, 1847, which uses the word "abolished." The plea avers positively that the court was abolished by that order. The replication, to which the defendant has demurred, does in truth, according to the last rules of pleading, admit the fact of abolition, though it may be open to contend that the section does not give the crown power to abolish the court. Be this as it may, we are of opinion that the words of the statute are too plain to admit of any doubt—"that it shall be lawful for Her Majesty, by an Order in Council, to abolish,"—but without any restrictive words; and though the act contemplates that so long as the existing courts may be proper to be continued, and has given the Crown power to continue them, and to order them to be held as County Courts within or without the places so limited, it does not raise the question as to continuing or abolishing absolutely and exclusively in the discretion of Her Majesty in Council. The order of the 13th of March plainly abolishes the court of Kidderminster, and in terms it directs all courts to be abolished except those specified in the order; and then it goes on to specify some few which are to be continued and holden as County Courts, but the court of Kidderminster is not one of those specified. Nothing can be more plain than this, and the defendant is entitled to our judgment.

Judgment for defendant.

COURT OF QUEEN'S BENCH.

Michaelmas Term, 1849.

ROLFE v. LEARMOUTH.

gestion(a)—Jurisdiction—"Carrying on business"—Deputy sealer of the Court of Chancery.

uty sealer, whose duty it is to affix the Great Seal to instru- and who attends the Lord Chancellor for that purpose sometimes at Westminster Hall, sometimes at the House of Lords, and sometimes at the Crown's Inn, and who at other times attends at the Great Seal Office in Quality-court, Chancery-lane, is not a person who is on his business in any definite locality so as to be entitled to a suggestion under the County Courts Act. Whether the performing the duties of such an office is a carrying on business within that statute?

T, for goods sold and delivered, and on an account stated. *Verdict*—Never indebted.

particulars of demand were for 2*l.* 15*s.* for a coat. The case was tried before the Under-sheriff of Middlesex, when a verdict was found for the plaintiff for 2*l.* 15*s.*

The plaintiff now moved for a rule to show cause why a suggestion of non-payment should be entered on the roll to deprive the plaintiff of costs under the County Courts Act. The affidavit of the defendant stated that the plaintiff and the defendant dwelt within twenty miles of each other; that the defendant was and had been for many years, deputy sealer in the Court of Chancery, his business being to affix the Great Seal to instruments to which it was appropriate; that he carried on his business and performed his duties as such deputy sealer in a room adjoining the Lord Chancellor's court, in Westminster Hall, at all times when the Lord Chancellor held his court there; that when the Lord Chancellor performed his judicial duties in the House of Lords, he carried on his business and performed his duties, as such deputy sealer, in a room in the House of Lords, called the sealer's room; and when the Lord Chancellor sat in the Old Hall at Lincoln's Inn, he carried on his business and performed his duties as such deputy sealer in a room adjoining the Old Hall, called the sealer's room:

In cases tried or to be tried after the 14th August 1850, the necessity for entering a suggestion on the roll to deprive the plaintiff of his costs, has been done away with by 13 & 14 Vict. c. 10. But the various points decided on motions for suggestions will be equally applicable to proceedings before a judge at chambers, under the 13th section of that statute.

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and when the Lord Chancellor did not sit as judge in either of the above places, he attended daily at the Great Seal Patent Office in Chancery-lane, for the purpose of his business and duties aforesaid; that the said several places in which the defendant so carried on his business were within the jurisdiction of the Westminster County Court of Middlesex; that the cause of action arose in material point, to wit, the coat was ordered within such jurisdiction, and that neither the plaintiff nor the defendant were officers of the County Court. By sect. 128 of 9 & 10 Vict. c. 95, in actions where the plaintiff dwells more than twenty miles from the defendant, or where the cause of action did not arise wholly or in some material part within the jurisdiction of the court within which the defendant dwells or carries on his business at the time of the action brought, may be brought and determined in any of the Superior Courts. Sect. 129 provides, that if any action shall be commenced in any of the Superior Courts, for any cause other than those hereinbefore specified, and a verdict shall be found for the plaintiff for less than 20*l.*, the plaintiff shall have judgment to recover such sum only, and no costs. The carrying on business at several places, one of which is out of the jurisdiction of the County Court of the district, does not deprive a man of his right to enter a suggestion (*Croft v. Pitman*, 5 Taunt. 648; *Bush v. Levi*, 5 Bing. 315); and ignorance of the defendant's residence within the jurisdiction does not excuse the plaintiff (*Spencer v. Holloway*, 15 East, 647; *Crowder v. Bell*, 2 Dowl. 508; *Owen v. Albin*, 13 Price, 793.)

COLERIDGE, J.—I think that there ought to be no rule. It appears to me that this is not a case within the act of Parliament, which, when it speaks of the place of dwelling or of carrying on business, means some fixed place where the duty or business is carried on for some time, however short. Assuming, therefore, that the defendant carries on a business at all, about which I express no opinion, he carries it on at no fixed place. Where the Great Seal may be there it is his duty to go; he does not carry on his business at any fixed place for any definite time.

WIGHTMAN, J.—I am of the same opinion, and on the same ground. This defendant cannot be said to carry on his business at any particular place; and, in truth, it is not his business at all.

ERLE, J.—There is no fixed locality for this business, if it can be called so; but I am strongly inclined to think that it cannot. The duty of the defendant is that of using the Great Seal on occasions where it is required, and for that purpose there is no place more appropriate than another.

Rule refused.

COURT OF EXCHEQUER.

Michaelmas Term, 1849.

BUCKLEY v. HANN.

*Question—Jurisdiction—Carrying on business—Clerk to the Board of Admiralty.**A clerk to the Board of Admiralty in the General Register Office of the Admiralty, No. 70, Lower Thames Street, is not a person carrying on business in the city of London within the meaning of 10 & 11 Vict. c. 113.**That the words "carrying on his business" mean a carrying on independent business.(a)*

In this case *W. L. Thomas* had obtained a rule to show cause why a suggestion should not be entered to deprive the plaintiff of his action under the London Small Debts Act. The action was brought against the acceptor of a bill of exchange for 12*l.* The bill was tried by the secondary of London under a writ of trial, and the plaintiff obtained a verdict for 12*l.* 4*s.* The affidavit on which the rule for a suggestion was obtained stated, that at the time the action was brought the defendant carried on his business at No. 70, Lower Thames Street, in the city of London, and that a plaintiff's cause of action might have been entered in the Sheriff's Court under the statute; that at the time when the said action was brought, the plaintiff dwelt at, &c., which place is distant more than twenty miles from the defendant's said place of business, and that no officer of the County Court was a party. It further stated, that the bill was drawn and accepted in the city of London, indorsed and handed over in Middlesex, and the defendant was a clerk in the General Register and Record Office of the Admiralty in Lower Thames Street, in that city.

Thomas showed cause.—The facts disclosed do not bring the case within the statute. The words "carrying on his business within

40. And be it enacted, That such summons may issue, provided the defendant or one of the defendants shall dwell or carry on his business within the City of London or the County of Middlesex at the time of the action brought, or provided the defendant or one of the defendants shall have dwelt or carried on his business therein at some time within six calendar months before the time of the action brought, or if the cause of action arose therein.

41. And be it enacted, That all actions and proceedings which before the passing of this Act have been brought in any of Her Majesty's Superior Courts of Record, where the defendant or one of the defendants dwells more than twenty miles from the defendant, or where any officer of the court or the provisions of this Act shall be a party, except in respect of any claim to any chattels taken in execution of the process of the court, or the proceeds or value of any such chattels, shall be brought and determined in any such Superior Court, at the election of the party bringing the same, as if this Act had not been passed.

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the city of London” are not satisfied by proof that the part out of the city, and was a clerk daily attending an office within the city. In the old London Court of Requests Act, 39 & 40 G. 3, the words are, “residing or inhabiting within the city of London or the liberties thereof, or keeping any house, warehouse, shed, stall or stand, or seeking a livelihood, or trading or carrying on any business within the same city or liberties.” Under that act, the Court of Queen’s Bench held, in the case of *Smith v. Hurrell* (10 B. 542), that a clerk in the Excise Office, in the city of London, attended there for certain hours every day, was not a person “seeking a livelihood” in the city within the meaning of the act. Under the 9 & 10 Vict. c. 95, (the general County Courts Act), it was also held that a deputy sealer of the writs in the Court of Chancery, and in that capacity bound to attend the Lord Chancellor when he sits at Westminster, is not a person carrying on his business within the city. *Rolfe v. Learmouth* (1 Cox & Macrae 104). *W. L. Thomas*, contra.—If any part of the cause of action is within the city, that would be sufficient ground for entering a suggestion. In the case of *Butler v. Concy* (1 Cox & Macrae 104) it was held by this Court, that to obtain a suggestion under the general County Courts Act it was sufficient in the first instance to negative the exceptions in the 128th section.

Cur. adv.

JUDGMENT.—February 8.

PARKE, B.—This was an application to deprive the plaintiff of his costs under 10 & 11 Vict. c. 71, and the question was, whether a clerk in the Admiralty, whose business it was to attend at certain times in the city, is a “person carrying on his business” within the limits of the city. The same point was considered by the Court of Queen’s Bench with reference to the general County Courts Act in the case of *Rolfe v. Learmouth*. We think the construction put upon these words in that case to be the correct one. In adopting the same construction here, we think that a clerk whose business it is to attend at certain times at a particular place in the city of London, cannot be considered as carrying on an independent business within the meaning of the act. The rule must therefore be discharged.

Rule discharged.

JUDGES' CHAMBERS.

(Before PLATT, B.)

MITCHELL v. THOMPSON.

Practice—Certiorari—Motion after hearing.

int in an action of trespass was entered in a County Court, both plaintiff and defendant appeared at the hearing, and the case was by heard. The judge, however, postponed the delivering of his judgment. In the meantime an application was made to a judge at chambers for a certiorari to remove the plaint to a Superior Court: that it was not too late to make the application.

this case *W. M. Cooke* applied *ex parte* before Platt, B. at chambers, under the 9 & 10 Vict. c. 95, s. 90, for a *certiorari* to remove a cause from the Edmonton County Court to the Exchequer of Pleas. The affidavit upon which the application was made stated that the cause, which was a plaint entered against defendant for alleged damages done to the plaintiff's horse by defendant's servant, was heard before Mr. Koe, the Judge of Edmonton County Court, and that the judgment was deferred to the following court day. The affidavit further stated, that damages claimed exceeded 5*l.*, and that various points of law, of difficult nature, were involved in the decision. *Cooke* contended, that upon this affidavit the judge had it in his power to grant the application, and that the 43rd of Elizabeth, c. 5, and Statutes 1, c. 23, s. 2, limiting the time for the judge or officer of the Inferior Court to receive the writ of *certiorari* did not apply to County Court cases. *Laws v. Hutchinson* (3 Dowl. 506); *Smith v. Rling* (3 Dowl. 609); and *Fox v. Veale* (8 M. & W. 126) relied on as authorities to show that a *certiorari* may be granted at any time before judgment.

PLATT, B.—You may take the writ upon giving security for

COURT OF COMMON PLEAS.

Michaelmas Term, 1849.

SMITH v. PRITCHARD AND OTHERS.

*Liability of High Bailiff for the acts of his officers—Constructi
9 & 10 Vict. c. 25, s. 114.**The high bailiff of a County Court received a warrant for the com
ment of T. S., which he delivered to his under-bailiff to execute.
under-bailiff broke into the plaintiff's factory to search for T. S.
during the search he was assaulted by the plaintiff. He then le
factory, and returned with a policeman, and took the plaintiff int
tody for the assault.**Held, 1st. That the high bailiff was liable for the trespass committ
the under-bailiff in breaking into the plaintiff's factory to execu
warrant.**2nd. That he was not liable for the assault and false imprison
committed by his under-bailiff in sending for a policeman and
the plaintiff into custody, as the under-bailiff in doing so acte
under colour of the warrant, but under s. 114 of 9 & 10
c. 95.**3rd. That the power to arrest given by 9 & 10 Vict. c. 95, s. 114,
compulsory but optional.*

TRESPASS. The first count of the declaration was for b
ing and entering the plaintiff's factory; the second for as
and false imprisonment.

Pleas—1. Not guilty. 2. Not the plaintiff's factory.

At the trial, in Middlesex, before Williams, J., it appeared the defendants were William Pritchard, high bailiff of South County Court, Beaver, his under-bailiff, and William Tarn Pritchard, the high bailiff of the Lambeth County Court, and Jones under-bailiff. Thomas Smith the younger, the son of the plaintiff, was sued in the Lambeth County Court and a warrant was directed to the high bailiff of the Lambeth County Court, to serve him. This warrant was sent for execution to the clerk of Southwark County Court, who issued it to the high bailiff of Southwark County Court, under 9 & 10 Vict. c. 95, s. 104. Two assistant bailiffs went to the plaintiff's factory to execute the warrant, and, believing Smith, jun. to be there, broke in and resisted by the plaintiff, and in the course of that resistance the plaintiff made, as was admitted, an assault upon one of the under-bailiffs. Not succeeding in taking Smith the younger, the u

left, but subsequently returned and took the plaintiff into · for the assault on the under-bailiff, while in the execution uty, under sect. 114. The verdict was taken for 10*l.* da- on the first count, and for 60*l.* damages on the second count, the two under-bailiffs, and for the defendants as against h bailiffs.

s, Serjt., pursuant to leave reserved, moved to enter the for 70*l.* against the two under-bailiffs and the two high- or against the two under-bailiffs of the high bailiff of the ark County Court. There is no doubt that the two under- are liable both for the breaking and entering, and the and imprisonment, but the judge at the trial, although of that the high bailiff of the Southwark County Court was on the first count, as his deputy was entrusted with the on of the warrant, doubted whether the high bailiff of th County Court was liable. The 9 & 10 Vict. c. 95, ss. 33, id 114, were referred to. The high bailiff of the Lam- ounty Court is a party to the execution, by sending, under 14, the warrant of his County Court for the arrest to the ark County Court, accompanied with a warrant under his equiring execution of the warrant for the arrest. This was e of an unauthorized sending of the warrant to the South- ounty Court. [WILDE, C. J.—No, the high bailiff of the th County Court was compelled by the act to send it. z, J.—There is no personal interference by the high bailiff Lambeth County Court, and the interference of his under- can only be regarded as by way of assistance to the under- of the Southwark County Court, who was the person ed with the execution of the warrant.] The court said as no ground for making the high bailiff of Lambeth · Court liable, and only granted a rule *nisi* to set aside the for the defendant, the high bailiff of Southwark, and to verdict for the plaintiff, as against him and the two under- either for 10*l.* or 70*l.*

frey and *Hannen* showed cause.—It was at the trial, and is dmitted that the high bailiff of the Southwark County s liable upon the count for breaking and entering, but it is led that he is not liable for the assault and imprisonment. sault upon the under-bailiffs was made on the first occasion nder-bailiffs going to the factory ; and subsequently finding t. 114 gave them power to take the party assaulting into ; they return, and take, and imprison him. This taking is not nder colour or by virtue of the writ. [MAULE, J.—Is not y bailiff to whom power is given to take persons offending stody under sect. 114, the bailiff named in the warrant, that is so, is not the under-bailiff, whom the high bailiff rusted as a fit and discreet person with the execution rarrant, when he arrests an offender under sect. 114, acting ie or under colour of the writ?] It is submitted that he [WILDE, C. J.—You say his authority to arrest is derived

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from the act of Parliament, not from the warrant?] Y power is given for the protection of the officers employ duty, not for that of the high bailiff, which is a matter ent pendent of the warrant. The warrant would be sati spent when *the party against whom* it was issued is arre yet this power of taking into custody *any* offender under would remain. Suppose sect. 114, instead of giving the take into custody, had given a right of action, could it be the action was brought under colour of the writ? (offender, when taken into custody under sect. 114, were 1 bailiff what his authority was for taking him into cus answer must be, I arrest you under the authority of 1 Parliament, and the warrant would only be evidence of th authority to do the act during the performance of which tl was committed: (*Smart v. Hutton*, 8 A. & E. 568, was to.)

Byles, Serjt., and *Bovill*, in support of the rule.—By every high bailiff is responsible for all the acts and do himself and his under bailiffs, in like manner as any responsible for the acts and defaults of himself and his (*Parrot v. Mumford*, 2 Esp. 585; *Ackworth v. Kempe*, 1 L If the officer arrest A. instead of B., yet the sheriff is li is not necessary to show that the warrant gave the powc offenders under sect. 114 into custody; it is sufficient to high bailiff liable, if the under-bailiffs, when they took the into custody, thought that they were acting under the [MAULE, J.—Do you say that the bailiff is bound to offender into custody under sect. 114? May he not ove offence committed upon him?] He is not compelled to offender into custody. [MAULE, J.—Then the *bonâ fide* officer in believing that he was acting under the war nothing to do with the liability of the high bailiff, for h liable for the officer's misconduct in doing something which optional for the officer to do, but which the officer is bou That is, for the misdoing of something which the high bound to do himself, and which thing he has entrusted to else to do.]

WILDE, C. J. had left the court before the close of the a

MAULE, J.—The Lord Chief Justice was of the same so far as he heard the argument, as we have come to. The of the high bailiff is not so extensive as contended fo plaintiff. The high bailiff is placed, in relation to hi bailiffs, by sect. 33, in the same responsibility as the sher the ordinary law in relation to the bailiff who executes rant. It is admitted that, unless the high bailiff is liabl section, he is not liable at all. Now the liability of the s case of the misconduct of his officer, is confined to cas officer's misdoing something that he was compelled to do. officer misdoes something he is ordered to do, it is no ar the sheriff to say, so far from ordering the officer to do t

lained of, I enjoined him not to do it, but to do something still the sheriff is liable. Inasmuch, therefore, as sect. 114, reasons which must be taken without any doubt to be nal, and not mandatory upon the under-bailiff, the act for h it sought to make the high bailiff liable was an act h, at the utmost, the under-bailiff thought he *might* do, an act which he was called upon to do. The section only s a power already incident to the office. In either of e views, it would be extending the case beyond principle and ority to make the high bailiff liable. The reason why the iff is liable for the misconduct of his bailiff is because the law upon him to do the act, and instead of doing it himself he ints some one else to do it. I think, therefore, that the ver- can only be against all three for 10*l.* on the first count.

WILLIAMS, J.—I am of the same opinion. The case was very tedly and justly put by Mr. Hannen, when he said, suppose under-bailiff had been asked what his authority was for taking rson offending into custody, the reply could only be the act arliament. The warrant is only evidence of the authority of igh bailiff to the under-bailiff, to whom, while acting under uthority, that must occur which would justify him in giving a m into custody under the act of Parliament.

ALFOURD, J., concurred.

*Rule absolute, without costs, to enter verdict for the plaintiff on first count, with 10*l.* damages against the three.*

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COURT OF EXCHEQUER.

Hilary Term, 1850.

WALKER v. FURNELL.

Practice—Suggestion—Affidavit Costs.

anger to the cause may make an affidavit deposing to the facts ssary to be brought before the court, for the purpose of entering a ggestion on the roll to deprive the plaintiff of costs under the County orts Act, 9 & 10 Vict. c. 95.

ntiff traversing the suggestion is not entitled to the costs of the issue, ough he succeeds.

IIS was a rule calling upon the plaintiff to show cause why he should not bring the *postea* into court, and file the plea and why the defendant should not be at liberty to enter a

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suggestion thereon to deprive the plaintiff of costs, under the 9 & 10 Vict. c. 95. The action was brought to recover the sum of 4*l.* 16*s.*, and at the trial before the under-sheriff of Middlesex the plaintiff obtained a verdict. The affidavit was made by a stranger to the cause.

Joyce showed cause.—The defendant in the action has not made an affidavit, nor has his attorney, setting forth the circumstances of the court upon which the plaintiff is sought to be deprived of costs; but a stranger, a contractor's clerk, unconnected with any of the parties, is put forward to do so. Such an affidavit is insufficient.

PARKE, B.—This kind of affidavit would not be received on motion to set aside a judgment for irregularity.

Barstow, contra.—This case is very different from an application to set aside the judgment for irregularity, for in that case must be shown that the party applying has merits; a fact which can only be known to himself or some one connected with the suit; here, on the contrary, it is sought to enter a suggestion which is traversable, and the truth of which may be known to a stranger. The limit of the jurisdiction of a County Court, for instance, is a matter of a public nature, which may be better known to a stranger than to the parties to the suit, and the place of abode of either of them may be better known to a stranger than to an adversary. Besides, if the facts sworn to here are true, the defendant is entitled, as a matter of right, to deprive the plaintiff of his costs; and the court should not be so strict in such a case as where a party asks a favour. The Courts are very strict about pleas in abatement, and yet the affidavit of verification may be made by a stranger: (1 Tidd's Pr. 640, 9th ed.) [PARKE, B.—also might an affidavit to hold to bail under the old practice (*R. v. Lord Turner*, 1 Chitty, 58), which is a much stronger case than the present.

POLLOCK, C. B.—We have spoken to the Master, and he reports that there is no such rule as would prohibit a stranger from making an affidavit like the present. Here is an affidavit made by a person who does not disclose his means of knowing the facts he deposes to. Such an affidavit is not to be rejected, but weighed; and however desirous we might be to introduce such a rule, we have no power to do so.

PARKE, B.—I am of the same opinion. If any rule of practice existed as to not receiving the affidavit of a third person who does not show how he has acquired a knowledge of the facts to which he deposes, it might be a reasonable one. In the present case although our decision is not final, seeing that the suggestion may be traversed, yet we ought not to put the plaintiff to traversing unless we think the suggestion true, for in the event of his succeeding on that traverse he cannot recover the costs of it. But as the Master says that there is no such rule, as we know that there is none such applicable to affidavits verifying pleas in abatement, or to affidavits to hold to bail, or as appears from *Shearman*

brick (6 Scott's N. R. 833), to motions to change the venue : ordinary affidavit, we ought not to introduce such a rule : case, although it may be a question whether it should not l down as a rule of practice.

DERSON, B.—I agree that the practice is as laid down by arned brother, but I think it ought to be changed by rule of

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Rule absolute.

COURT OF EXCHEQUER.

Hilary Term, 1850.

(Before Baron ALDERSON.)

DUCK v. BARTON.

Suggestion—Practice.

Idavit for a suggestion to deprive the plaintiff of costs stated that fore and at the time this action was brought, deponent carried on business at &c. within the district of Southwark, in the county of rey, and within the jurisdiction of the Southwark County Court ; en under the provisions of the said act, and that the cause of action e on some material point within the jurisdiction of the County rt of Southwark aforesaid, and that at the time of the commence- t of this action, the plaintiff did not dwell more than twenty miles a deponent, but dwelt within twenty miles from the deponent," &c. to be insufficient, because it did not distinctly show that defendant lt within twenty miles from plaintiff, insomuch that perjury could be assigned upon it if plaintiff dwell more than twenty miles from ndant.

RULE had been granted to enter a suggestion to deprive the plaintiff of costs, under 9 & 10 Vict. c. 95, s. 129. The it of the defendant alleged that "before and at the time this was brought, deponent *carried on his business* at &c. within strict of Southwark, in the county of Surrey, and within the ction of the Southwark County Court, holden under the ions of the said act, and that the cause of action arose in material point within the jurisdiction of the County Court of wark aforesaid; and that at the time of the commencement s action, the plaintiff did not dwell more than twenty miles from nt, but dwelt within twenty miles from the deponent," &c. &c. *Idor* showed cause.—The 129th section of the County Courts rovides that if any action shall be commenced in any Supe-

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rior Court for any cause, *other than those lastly specified*, for which a plaint might have been entered in a County Court, the plaintiff shall have judgment to recover such sum only, and no costs.

128th section states the excepted cases to be "all actions and proceedings which before the passing of this act might have been brought in any of Her Majesty's Courts of Record, where the plaintiff dwells more than twenty miles from the defendant, where the cause of action did not arise wholly, or in some material point, within the jurisdiction of the court within which the defendant dwells, or carries on his business, at the time of the action brought, &c., may be brought and determined in any Superior Court at the election of the party suing." The defendant is bound to show affirmatively that he comes within the exceptions. The affidavit does not show that the defendant *dwelt* within twenty miles of the plaintiff, but only that his place of business was within the limits. *Peterson v. Davis* (1 Cox & Macrae, 148), is precisely the point. There an application had been made, under the City of London Sheriff's Court Act, for a suggestion to deprive the plaintiff of costs on an affidavit stating that the plaintiff did not dwell more than twenty miles from the place where the defendant carried on his business, and it was held to be insufficient. So, in *Johnson v. H* (18 L. J. 225, C. P.), the affidavit stating that "plaintiff did not dwell more than twenty miles from the defendant, but did not dwell within twenty miles from the defendant, to wit, at," &c. was held to be insufficient, because perjury could not be assigned upon an affidavit stating that the plaintiff dwelt more than twenty miles from the defendant.

Pearson, in support of the rule.—This affidavit is sufficient, because it follows the very words of the statute. [ALDERSON, B.—] The affidavit is not necessarily true. The legal effect of a statute, and not the facts, are to be followed. Here the clear intent is, that the plaintiff should be deprived of costs if the defendant resided within twenty miles of him: this the defendant is bound to show affirmatively and distinctly. Does this affidavit so? Certainly not. Test it thus. Suppose it should turn out that the defendant dwelt more than twenty miles from the plaintiff, and the deponent was indicted for perjury, and the perjury assigned was, that he had sworn that the defendant resided within twenty miles from the place of the plaintiff's residence, would the affidavit prove that he had so sworn? The affidavit distinctly states the plaintiff might have been sued in the Southwark County Court.

ALDERSON, B.—The case of *Peterson v. Davis* is conclusive. It was a formal decision of the full court, and I could not overrule it, even if I considered it wrong, which I do not. To allow me to enter your suggestion, with certainty that it would be defeated on demurrer, would be only to put the parties to needless expense.

Rule discharged, with costs.

COURT OF EXCHEQUER.

Hilary Term, 1850.

(Coram ROLFE, B., sitting apart to hear motions.)

EDWARDS v. ROGERS.

Jurisdiction—Prohibition—Certiorari—Costs.

entered a plaint in a County Court to recover 20l. for damages done to his field by certain lime kilns of B. during the period from November 10th, 1843, to October 30th, 1849. That plaint having been removed to this court by certiorari, on the ground that the lime kilns were of greater value than 20l., and that B.'s property in them would be destroyed if A. were to succeed, A. entered a second plaint in the County Court for 5l. for the same cause of action, laying the period of the injury to be from November 10th, 1843, to November 30th, 1849.

held, that the County Court had jurisdiction to entertain the second plaint, and that, therefore, prohibition would not lie, and that a certiorari could not issue, as the cause of action did not exceed 5l. Costs will be allowed to the successful party, though the other party has been guilty of no impropriety, as the object of granting them is to reimburse the successful party, and not to punish the other.

THE plaintiff had brought an action in the County Court against the defendant, to recover 20l. damages for an injury alleged to be done to his fields by the fumes of certain lime kilns belonging to the defendant, from November 10, 1843, to October 30, 1849. A certiorari was granted by this court, on an affidavit that the lime kilns were worth more than 20l., and would be rendered valueless if the plaintiff were to obtain a verdict. Thereupon the plaint was removed into this court. On November 30, another action was brought in the County Court against the defendant by the plaintiff, demanding 5l. for injury done by the lime kilns, from November 10, 1843, to November 30, 1849. The defendant pleaded that the former suit was pending, but the judge ordered the cause to proceed. It was, however, adjourned, and now a prohibition was moved to stay further proceedings in it. *Halker* said that he would abandon the rule for certiorari.

Unthank now showed cause.—The 90th section of 9 & 10 Vict. c. 95, enacts, that “no plaint entered in any court holden under the act shall be removed or removable into any of Her Majesty’s superior Courts of Record, by any writ or process, unless the debt

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or damage claimed shall exceed 5*l*. A *certiorari*, therefore, not issue in this case. But a prohibition is only an attempt to obtain the same objects. The only ground on which a Superior Court will grant a prohibition is that the inferior court is trespassing beyond its jurisdiction. In some cases, indeed, where the power to proceed by *certiorari* has been taken away, the courts have allowed a *habeas corpus* to issue, but this is in favour of liberty. So in Com. Dig., Prohibition A. 1, it is laid down that prohibition may go to the Cinque Ports if they proceed for the cause of a suit well commenced at law, but the authority cited for that is *Williams v. Lister* (Hard. 475), which only shows that the inferior court will be restrained if it pretends to prohibit the Superior Court. The existence of the former complaint in this case makes no difference; for when a cause is removed by *certiorari*, on the application of the defendant, the plaintiff is not bound to follow the cause into the Superior Court (*Norrish v. Richards*, 5 Nev. & M. 268), and the plaintiff is willing to discontinue it if the court shall require. The pendency of the former complaint, is, it would seem, no bar to the cause in the County Court, and even if it were, the plea is not good to part only of the cause of action: (*Hill v. White*, 6 Bing. 26.) Nor is this any hardship upon the defendant, for if judgment be recovered against him in the County Court, he cannot plead that judgment and payment under it in bar of the action.

Hake in support of the rule.—Whatever the form of the action, the real question at issue is, the whole value of the lime-kiln; if the plaintiff succeeds there will be a fresh cause of action against the defendant every day they continue to be used. It is not the right to use the lime-kilns at all is at issue—this must be tried by the judge of an inferior court, although the question has been already carried for decision before this Court. The sum claimed differs, but the cause of action is the same. The plaintiff is, in fact, dividing his cause of action, and bringing two complaints upon it, which, by section 63, he is forbidden to do. [ROLFE, B.—This is not a “splitting” of a cause of action. It means that if one have a cause of action for A., B., and C., he shall not have a separate cause for each. Here the plaintiff proceeds for his whole cause of action in the first complaint. The real objection is, that having proceeded for A., B., and C., he now proceeds for A., B., C., and D.] Yes, and so would recover damages twice over.

ROLFE, B.—I do not think I have any discretion in this case. I may have a discretion where I have jurisdiction to prohibit, but not where I have no jurisdiction to do so. I will look to the affidavits.

Cur. adv. r.

January 26.

ROLFE, B.—I have considered this case, and I am satisfied that the court has not power to grant a prohibition. The statute expressly enacts, that where the cause of action is less than

shall not be removed; and I cannot presume that the Judge of the County Court will not do justice and decide correctly. But I shall make it a condition that the plaintiff shall not proceed with the plaint, which has been removed into this court.

Unthank applied for the costs of the present application, which was resisted by *Bagley*, on the ground that in making it the defendant had not been guilty of any impropriety.

ROLFE, B.—I think the costs should be allowed. Costs are not to be looked upon as a punishment for crime, but as a compensation to the other party. As the defendant has put the opposite party to expense, it is only right that he should reimburse him.

Rule discharged with costs, the plaintiff undertaking not to proceed with the first suit.

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COURT OF EXCHEQUER.

Trinity Term, 1850.

THE APOTHECARIES' COMPANY v. BURT.

Jurisdiction—Prohibition—Action for penalties—Excess above 20l.

A plaint was entered in a County Court to recover 20l. penalty for practising as an apothecary. The particulars stated the cause of action thus: "Action to recover 20l. for that on ——— and on divers other days and times the defendant did act and practise as an apothecary, &c. at A. in the county of C., A. in the county of N., B. in the county of C., and B. in the county of N., by then and there attending on E., F., G., and H., whereby he has forfeited 20l." &c. It was shewn that such particulars did not disclose a cause of action exceeding 20l., and that, therefore, the County Court had jurisdiction.

THIS was a rule, calling upon the Judge of the Cambridgeshire County Court to show cause why a prohibition should not issue to restrain all further proceedings in this action. The following plaint had been entered:

Summons to appear to plaint.

No. of plaint, C. 140.

Between the Master, Wardens, and Society of the art and mystery of Apothecaries of the city of London, plaintiffs, against John Gordon Kelly Burt, defendant.

Sect. 59.—You are hereby summoned to appear at a County Court, to be holden at the Session-house in Wisbeach, St. Peter's, on the fifth day of April next, at the hour of nine o'clock in the

APOTHECARIES	forenoon, to answer the above-named plaintiffs, in an action on a
COMPANY	tract, irregularly practising as an apothecary.
v.	See particulars annexed.
BURT.	Debt or claim - - - - - £20 0 0
1850.	Costs of summons and service - 1 9 0
Jurisdiction—	Paying money into court and out of court,
Action for	entering satisfaction, &c. - - - 0 1 8
penalties.	Calling cause - - - - - 0 0 0
	£21 10 8

This is an action brought to recover the sum of 20*l.* for the after the 1st day of August, 1815, mentioned in a certain act of Parliament passed in the 55th year of the reign of His Majesty King George the Third, intituled "An Act for better regulating the practice of Apothecaries throughout England and Wales," and before the commencement of this suit, to wit, on the 17th day of November, 1849, and on divers other days and times the defendant (he the defendant not being a person who, on the said 1st day of August, 1815, or at any time theretofore, was actually practising as an apothecary) did act and practise as an apothecary in England, and within the jurisdiction of this court, that is to say, in Upwell, in the Isle of Ely, and county of Cambridge; Upwell in the county of Norfolk; Outwell in the Isle of Ely, and county of Cambridge; and Outwell, in the county of Norfolk, by then and there, as such apothecary, attending and advising and furnishing and supplying medicines to and for the use of certain persons, to wit, one George Swan, one Caroline Palmer, one Eliza Anderson and one William Ransom, without having obtained such certificate as by the said act is directed, contrary to the form of the statute in such case made and provided, whereby, and by force of the same statute, the defendant forfeited for his said offence the sum of 20*l.* The sum of 20*l.* so forfeited is the sum which this action is brought to recover.

Martin, Q.C. and *Robinson* now showed cause.—It has been already decided that actions for penalty may be brought in the County Court. When the rule was obtained it was made to appear that the action was brought for four penalties. This, however, is not the case. We only seek to recover one penalty, and the judge would have stopped the case as soon as one was clearly established.

PLATT, B.—It should be given in evidence, not in the particulars. You take advantage of the whole four in order to have a chance of succeeding on either.

Martin.—The intention of the plaintiffs was to give the defendant information as to the acts he meant to go for.

ROLFE, B.—You are entitled to recover one penalty for acting as an apothecary generally.

ALDERSON, B.—The whole of your practising is, according to your argument, one act of practising.

Robinson.—So it may be until he is prosecuted.

ALDERSON, B.—Surely every separate attendance on each patient is a separate offence.

Robinson.—The act does not make the form of proceedings the basis as to jurisdiction. The question is, what he demands. He demands the excess.

Naylor, contra.—The simple question is, whether the particulars disclose a cause of action for more than 20*l*. They say that the defendant practised at four different places, on four different persons, at four different times. An action for the same cause may be brought in the County Court again. The Apothecaries' Company cannot abandon any part of the penalty, as only one-half belongs to them; sect. 26 gives one-half of the penalty to the informer. Besides, there has not been here a sufficient abandonment of the cause of action. This court, in *Grimbley v. Aykroyd* (10 Ex & Macrae, 79), have defined what a cause of action means, and the excess of such cause of action should be expressly abandoned in the particulars: (*Vines v. Arnold*, 19 L. J. 98, C. B.)

WOLFE, B.—It seems to me that you cannot sue for penalties at the County Court.

Naylor.—The cause of action appears to be 80*l*.; and the plaintiff could not abandon any part, as one-half belonged to other persons.

COLLOCK, C.B.—This rule must be discharged. I do not see any reason for depriving the County Court of jurisdiction. The plaintiff's claim is limited to 20*l*., and no more can be recovered on this plaint. The particulars of the claim are certainly ambiguous and might give rise to a question on which it will be necessary to pronounce a decision, viz., whether the illegal acts done by the defendant at different days and places, may be made the subject of one or more penalties. The present claim is limited to 20*l*., more cannot be recovered; and the County Court has jurisdiction to that amount whether the claim be originally within that limit or the plaintiff be willing to reduce his demand to that limit and abandon the surplus.

ALDERSON, B.—I do not see that the plaintiffs have a cause of action above 20*l*.; consequently there can be no abandonment of the claim. The particulars may be ambiguous and open to special consideration, but that is for the judge of the County Court, who will do well at the trial to make them elect on which of the four they mean to go, and use the others as evidence.

WOLFE, B.—I am of the same opinion, on the simple ground that this is an action for a personal demand not exceeding 20*l*. The plaintiffs say, "We go for a penalty of 20*l*. under the Apothecaries' Act, and will prove it by showing that the defendant has attended at A., B., C., and D."

LATT, B., concurred.

Rule discharged.

APOTHECARIES
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Jurisdiction—
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COURT OF COMMON PLEAS.

*Trinity Term, 1849, and Hilary Term, 1850.**Ex parte KEIGHLEY, Re KEIGHLEY v. GOODMAN.**Costs as between attorney and client — Construction of 9 & 10 Vict. c. 95, s. 91.(a)*

Section 91, of 9 & 10 Vict. c. 95, provides that "no attorney shall be entitled to have or recover therefore any sum of money, unless the debt or damage claimed shall be more than 40s., or to have or recover more than 10s. for fees and costs, unless the debt or damage claimed shall be more than 5l., or more than 15s. in any case within the sum of jurisdiction given by this act."

Held 1st, that the above provisions apply only to business done in the County Court; 2nd. That they do not abolish the ordinary distinction between the costs to be allowed between party and party, and the remuneration to the attorney is entitled to from his client.

3rdly. That an attorney is entitled to recover from his client for costs done out of court, in a suit in the County Court, a reasonable remuneration beyond what is allowed by the above section.

Overruling Ex parte Clipperton (1 Cox & Macrae, 136.)

BYLES, Serjt. showed cause against a rule obtained in Trinity Term last, by *J. Brown*, calling on the defendant to show why the Master should not review his taxation of costs in this case. Two bills had been referred to the Master for taxation; the first was immaterial here; the second was for business transacted in the County Court in a cause *Goodman v. Martin*. The affidavits did not clearly show what was the nature of the action in the County Court, but I believe that it was for an excessive distress; a sum of 39l. having been distrained for, when 25l. only was due. The County Court gave judgment for 19l. 19s. The affidavits conflict as to what this sum is for; the plaintiff says it is for 12l. 10s., the amount of excessive distress, and 7l. 9s. damages in respect thereof.

(a) 13 & 14 Vict. c. 61, s. 6, enacts, "that the fees to be taken by barristers and attorneys practising in the said courts, in cases brought within the jurisdiction given by the said act, shall be as follows; an attorney shall be entitled to have or recover a sum not exceeding 1l. 10s. for his fees and costs, where the debt, damage, or demand claimed in any covenant, debt, detinue, or assumpsit, shall not exceed 35l., or 2l. in any other case, within the jurisdiction given by this act; and in no case shall any fee exceeding 2l. 4s. 6d. be allowed for employing a barrister as counsel in the cause; and the expense of employing a barrister or attorney, either by plaintiff or defendant, shall not be allowed on taxation of costs, in any order of the judge; and the judges of the said courts respectively shall from time to time determine in what cases such expenses shall be so allowed." It will be observed, that the words, "for appearing or acting on behalf of any other person in the said court," are not in the above enactment, and it may possibly, therefore be contended that the decision in *Ex parte Keighley*, will not apply to that section. But that act and the 9 & 10 Vict. c. 95, may be construed as one act, and section 6 of the former must therefore be construed with reference to s. 91 of the latter, and if so the rule laid down in *Ex parte Keighley*, will apply to cases within the extended jurisdiction.

it, in the suit *Goodman v. Martin*, paid the plaintiff 26*l.* 1*s.* 4*d.*, and this bill being 20*l.* 19*s.* 2*d.*, that leaves 6*l.* due from him to the present defendant. There was a dispute before the Master how much of the 26*l.* 1*s.* 4*d.* should be for costs. The defendant said, "by act of Parliament you are entitled to 15*s.*" The Master allowed the attorney 6*l.* 2*s.* 4*d.* the difference between 19*l.* 19*s.* for which the County Court judgment, and the 26*l.* 1*s.* 4*d.* allowed by the Master; this, the plaintiff says, is not enough; I say it is more than enough. The costs out of pocket were 3*l.* 17*s.* 4*d.*; add to this 15*s.* given in court, and the amount is 4*l.* 12*s.* 4*d.*; more than this he is not entitled to. Thus the case stood when the Master made his allocation. Whether plaintiff is entitled to more depends on 9 & 10 Geo. 4, c. 91, which says, that "no barrister, attorney, or other person, except by leave of the judge, shall be entitled to be heard in any question as counsel for any other person in any proceeding in any court holden under this act; and no person not an attorney admitted to one of Her Majesty's Superior Courts of Record, shall be entitled to have or recover any sum of money for appearing or acting on behalf of any other person in court, and no attorney shall be entitled to have or recover more than any sum of money, unless the debt or damage claimed be more than 40*s.*, or to have or recover more than 10*s.* for costs, unless the debt or damage claimed shall be more than 15*s.*, in any case within the summary jurisdiction given by this act." At the taxation this clause of the act and the case of *Ex parte Clipperton, re Green* (1 Cox & 136), were brought before the Master. This case seems to be a case for professional business in the County Court, as well as at the trial, the attorney shall have only 15*s.*, the object of the statute being to discourage professional assistance.

E, J.—As far as regards business in, and attending the trial, there is no doubt 15*s.* is all the statute intends he shall have.

Serjt.—The decision in *Ex parte Clipperton* is, that there shall be no difference in the taxation of costs between the trial, and attorney and client.

E, J.—The statute says, "appearing or acting in court;" appearing in court means something done in the court itself, acting means the same thing.

Serjt.—That was the argument in the Court of Queen's Bench, and they took time to consider the point. That case, it is decided, should govern the present. The Masters of all the County Courts shall have 15*s.* only, in addition to costs out of pocket. It will be noted that the difference between 12*l.* 10*s.* and 19*l.* 19*s.* is not covered for costs and charges, but that is not so. Here is a conflict upon the affidavits. I submit that this is a questionable construction of the statute, and that there has already been a decision upon it in the Court of Queen's Bench in my presence, wherefore this rule should be discharged.

E, C. J.—Where are the judge's notes of the trial?

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[A discussion here took place as to admitting them. Even the notes which had been certified as in the judge's handwriting (Mr. Koe's) by the clerk of the court, were handed up, as expected.]

Brown, J. in support of the rule.—It will appear on consideration that the sum of 7*l.* 9*s.* was for plaintiff's costs.

WILDE, C. J.—It is clear Mr. Koe could not give the amount of Keighley's costs as damages.

Brown, J.—We say that the judge had a right to give 7*l.* damages; but whether he had so or not, he gave it as damages.

MAULE, J.—The sum of 19*l.* 19*s.* was surely given for defendant's costs.

Brown, J.—No. There was 6*l.* 10*s.* for costs in the County Court *after* plaint. There is a broad distinction between the costs charged for in the case of *Ex parte Clipperton* and those in the present case. From the language of the judgment there is no need to show that the court had then under consideration the case before suit. The 91st section of the act contemplates only costs in and about the plaint.

WILDE, C. J.—The section seems to apply to the business of attendance actually in court.

Brown, J.—It does. It is impossible to suppose that the legislature intended to shut out attorneys from those courts.

WILDE, C. J.—Certainly, if that was the object of the legislature it is unfortunate, for it drives parties to employ persons very likely to advance their interests.

Brown, J.—Allowing the decision in the Queen's Bench to go to the fullest extent, it does not go the length the other side stretch it; in fact it does not touch this case at all. I say that the 15*s.* allowed by statute applies only to the plaint and not to the defence done before plaint, which is the nature of that for which we here claim. I submit this rule should be made absolute.

Cur. adv. i.

JUDGMENT.—February 25.

MAULE, J.—This was a motion to review the taxation of an attorney's bill. The Master had disallowed certain items for business done and preliminary inquiries before commencing a suit. One of the County Courts established by the act 9 & 10 Vict. The ground of the disallowance was, that the 91st section of the act prevented an attorney from having, as remuneration for his services in any suit, any larger sum than fifteen shillings. This condition of the section appears to have been adopted by the Queen's Bench in the case of *Ex parte Clipperton*. Having heard the case argued on this question, and having taken time to consider it, we find ourselves compelled to adopt a different construction of the section in question. That section begins by providing that no person but an attorney, or barrister-at-law instructed by such attorney, on behalf of the party, or any other person allowed by the judge to appear instead of such party, shall

1 to appear in the County Court for any other party, and person is, by the next clause, restricted from having a title to argue any question as counsel without leave of the

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This is followed by a clause in the following words:—"And son, not being an attorney admitted to one of Her Majesty's or Courts of Record, shall be entitled to have or recover m of money for appearing or acting on behalf of any other in the said court; and no attorney shall be entitled to have over therefore any sum of money, unless the debt or damage d shall be more than forty shillings, or to have or recover than ten shillings for his fees and costs, unless the debt or e claimed shall be more than 5*l.* or more than fifteen shillings case within the summary jurisdiction, given by this act." ction then goes on to provide "that no fee exceeding 1*l.* 3*s.* 6*d.* e allowed for employing a barrister as counsel in the cause, e expense of employing a barrister or an attorney shall not wed on taxation of costs in case of a plaintiff unless 5*l.* is red, or in case of a defendant unless 5*l.* is claimed, or in any ithout an order of the judge." The first clause, containing iption of the persons to be allowed to appear in the court ther party, seems very clearly to apply only to the appear- : the court of such person as the representative of a party ould otherwise have to appear for himself. The next pro- restricting the party to be heard to argue as counsel, also tly applies only to the proceedings *in court*. The clause in n begins with this provision:—"No person not being an r admitted to one of Her Majesty's Courts of Record, shall tled to have or recover any sum of money for appearing or on behalf of any other person *in the said court*." These certainly, in their literal construction, apply only to is done in the court; and this is not only the literal but the natural and obvious sense of the words, and bject of the preceding paragraph of the section, being in court only, confirms this construction. Indeed, it be difficult to conceive words more expressly to confine actment to what is done in court than those actually do, ppearing or acting on behalf of any other person." The next following, on which the present question immediately are "no attorney shall be entitled to have or recover *there- y* sum of money unless the debt or damage claimed shall be han forty shillings, or to have or recover more than ten s for his fees and costs unless the debt or damage claimed e more than 5*l.* or more than fifteen shillings in any case the summary jurisdiction given by this act." Here the word fore" clearly is intended to refer to the preceding words "for ng or acting on behalf of any other person *in the said court*." t the right to have or recover anything in cases not above illings is also taken away only in respect of "appearing or on behalf of any other person in the said court." It is true d "therefore" is not used in the provision, where ten shil- r fifteen shillings may be recovered; the words being—

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“to have or recover more than ten shillings for his fees or cost without saying “therefore.” But it appears to us that the provision is to be considered as applying to fees and costs of appearing or acting on behalf of any other person, and only to the appearing and acting on behalf of such person *in court*. If this were so, it would follow that, in cases not exceeding forty shillings the attorney might recover for what was done out of court, but not in cases exceeding that amount. Indeed, the Court Queen’s Bench, as reported, seem to have considered that the restriction of the fees to ten shillings and fifteen shillings shall be understood as the fees for appearing and acting *in the court* on behalf of another person, and express that opinion in the commencement of their judgment, observing that “the words of the section are very clear, ‘that no attorney shall be entitled to have or recover *therefore*,’ that is, for appearing or acting on behalf of any other person in the County Court, more than the sums specified.” Taking the language of the Legislature in its ordinary sense, the construction in question of the word “therefore” does not apply to business done out of court before the suit is commenced. We think, therefore, that, looking to the general scope of the enactment, we ought to come to the same conclusion on the subject. The proceedings in County Courts are a very fit subject of legislation. In establishing such courts, the act contemplates that the hearing of cases would be usually short, and therefore the limitation of the fees of parties appearing therein is naturally incident to such courts, and such regulations are not unusual in respect of proceedings in courts. But when one man employs another to do work and labour for him for a reasonable remuneration, it seems unreasonable to say that the contract shall not be binding if the employment is in a suit in County Court, but shall be binding if it is not. We think such a construction as this ought not to be allowed unless by implication, and there is none such here. The Court of Queen’s Bench has made an opinion, in *Ex parte Clipperton*, that the Legislature did not intend to make any distinction between an attorney’s right to recover from the opposite party and his own client; but we think there is no reason for construing the act as abolishing the existing distinction between the costs to be allowed between party and party, and the remuneration that the attorney is to recover from his client. The framers of the act use appropriate words in speaking of both kinds of claims; the attorney’s is described as a right “to have or recover,” while the costs between party and party are described as costs allowed on taxation. On the whole, we think there is nothing in this section to take away the right of an attorney to be paid a reasonable amount for work done out of court before the institution of the suit, or to take away the right of the Superior Courts, which alone have the jurisdiction to tax attorney’s bills, and to allow a reasonable remuneration for this description of labour.* The rule must, therefore, be made absolute.

Rule absolute

COURT OF COMMON BENCH.

Easter Term, 1850.

GREEN v. ARUNDEL.

Jurisdiction—Practice—Reducing claims.

entent to a plaintiff to reduce a claim below 5l., for the purpose of sending the plaintiff from being removed by certiorari into a County Court.

! demands of less than 5l. are not removable by certiorari, even though it be sworn that difficult questions of law are likely to arise.

S, Serjt. moved for a *certiorari* to remove a plaintiff from the County Court of Hertfordshire. The plaintiff had made a distress at the County Court at St. Alban's for 10l., for the taking his order a distress, which goods were sent for sale by auction and on the premises where the distress for rent was made, for the purpose of such sale: (*Adams v. Grave*, 1 Cr. & M. 380.) The defendant applied at chambers and obtained a *certiorari* to remove the plaintiff from the County Court. The plaintiff then issued another plaintiff out of the County Court for and in the affidavit in support of the rule it was stated that the claim was in respect of the identical causes of action for the first plaintiff was issued; and the affidavit also contained an allegation that matters of law were likely to arise, upon which it was desirable that the case should be tried in one of the County Courts. The only section of the 9 & 10 Vict. c. 95, to which is material to refer, is sect. 90, "that no plaintiff shall be removed or removable from the County Court into any of the County Courts by any writ or process, unless the debt or damage shall exceed 5l., and then only by leave," &c.

COURT.—A plaintiff cannot be removed under any circumstances, if the sum demanded does not exceed 5l.

Serjt.—Then there is another question. Can the plaintiff, already brought an action for the larger sum, now reduce the claim for the same cause of action to a less sum than 5l., to evade the jurisdiction of this court?

COURT.—There can be no doubt about it.

Rule refused.

BAIL COURT.

Hilary Term, January 30, 1850.

(Before Mr. Justice ERLE.)

JONES v. JAMES.

Jurisdiction—Practice—Prohibition.

In December 1847, an order was made by a judge of a County under sect. 60 of the 9 & 10 Vict. c. 95, for suing the defendant was then residing out of the jurisdiction. It did not appear thereupon any summons issued, but in January 1850, a summons was issued for an action in which the same parties were plaintiff and defendant and was served, together with the before-mentioned order upon the defendant, who was then residing out of the jurisdiction. Upon the defendant gave notice, as provided for by sect. 76, of his intention to plead the Statute of Limitations: but, before the day of trial, he moved this court for a writ of prohibition, on the ground that the County Court had no jurisdiction, there being no valid order to issue the summons:

Held, that whether or not the order of 1847 was sufficient to support a summons in 1850, the defendant had waived the objection by appearing and giving notice of his plea.

Quære, whether an order for leave to issue a summons into a foreign district must be founded on a plaint already entered?

IN this case a rule nisi had been obtained for a writ of prohibition to restrain further proceedings in this cause in the County Court of Cardiganshire. It appeared that on the 13th of October 1847, an application was made by the plaintiff to the judge of the County Court, under sect. 60 of the 9 & 10 Vict. c. 95, for leave to summon the defendant, who was then living somewhere in Middlesex, whereupon an order was made to that effect. Nothing further was heard of the action until the 3rd of January 1850, when a summons in this cause was issued out of the County Court, and duly served, together with the former order, upon the defendant, requiring him to appear at the return of the summons, namely, on the 25th. The defendant, in order (as it was stated) to avoid having judgment pronounced against him in case he did not plead and not succeeding in obtaining the present rule, gave notice (on the 19th of January), pursuant to sect. 76 and rule 1 of his intention to plead the Statute of Limitations. This rule nisi was obtained before the cause in the County Court was tried, in consequence of which the trial was postponed. It did not appear whether or not any summons had issued at the time of the granting of the order in 1847, or before the issuing of the summons in 1850.

uary 1850. The present rule was moved for on the 23rd of uary, upon the ground that as, from the long interval between granting of the order in 1847, and the issuing of the summons 1850, the latter could not properly be connected with the er, and as the defendant was living out of the jurisdiction of County Court of Cardiganshire when the summons issued, the eeding was void.

ir *J. Bayley* showed cause, and contended, first, that as the act Parliament contains no limitation as to within what time the umons must issue; after an order under sect. 60, it may issue at time; secondly, that the defendant had waived any objection n this ground by appearing and pleading.

Morgan Lloyd, contra.—The ground on which the County irt claims jurisdiction in this case is, that the cause of action e within the district, and in such a case a summons cannot e without the leave of the judge previously obtained. The onable construction of section 60 of 9 & 10 Vict. c. 95, is, t the obtaining such leave is a condition precedent to the mty Court having jurisdiction to entertain the action. Now, t there such leave obtained in this case? I apprehend not. e order for leave to issue a summons was in December, 1847, t the summons was not issued until January 1850. Upwards of y years having thus elapsed between the date of the order and t of the summons, the order for leave must be deemed to be nt, and to be no longer operative. The Legislature, in directing t in cases like the present a summons should only issue by leave the judge, contemplated that the judge should use a discretion granting or refusing leave according to the circumstances of the e; and, if so, the leave granted must be construed to mean ve to issue a summons within a reasonable time. Circumstances y exist in 1847 which might make it extremely reasonable that ummons should be allowed to issue against a party living out of : jurisdiction, which no longer exist in 1850. At the former iod, the defendant might be living in an adjoining parish, ereas at the latter period he may be living 400 miles off.

ndly. An order for leave must be in a cause already pending. does not appear whether a plaint had in this case been entered ore the date of the order, but as the summons was not issued til 1850, and the rule of practice directs that the summons uld bear the same date with the plaint, it must be presumed t the plaint was not entered until after the date of the order. hat be so, there was no cause in court in which the order could re been made, and the order was therefore void.

rdly. The fact of the defendant having given notice of his in- tion to plead the Statute of Limitations, does not supply the nt of jurisdiction, and that for two reasons—first, consent mot give jurisdiction; and, secondly, the giving of such notice s an act of necessity, since, if the defendant waited until the ults of this application would be known without giving such ice, he would be deprived of that defence in the court below.

Cur. adv. vult.

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JUDGMENT.

ERLE, J.—I am of opinion that the rule for a prohibition case ought to be discharged. It is a case in which the Court of Cardigan might have had jurisdiction to issue a subpoena against the defendant, who lived out of the jurisdiction upon the affidavit it is left in doubt whether a valid summons were served. The order was in 1847, a summons issued in 1850; but whether the order for leave made after the entry of the plaint or not does not appear. being so, it is unnecessary for me to determine whether there must be a plaint entered before leave to issue a subpoena can be given. I am clear it is a case in which the judge have jurisdiction if the defendant appeared and went on with litigation without taking the objection to the process which brought him into court. There is an order which may be regular, there is a summons which may be regular, and the defendant being served with them, appeared at the County Court office and did that which was equivalent to pleading—he gave notice that he intended to appear and defend himself, on the ground that the debt was barred by the Statute of Limitations, and the County Court clerk served a notice upon the plaintiff that the defendant intended to appear and defend himself upon the ground of the debt being barred by the Statute of Limitations. If the process is of doubtful validity, I am of opinion that if he came and pleaded to the action, he took away from himself the power of examining into any points, either of irregularity or of want of jurisdiction. As to the process upon which he was called upon to appear, he made it a valid suit in the County Court, and therefore this application for a prohibition ought to be discharged, but the process to which he appeared had become a valid process, taking all the circumstances into consideration, especially what learned counsel said had passed, I think it ought to be discharged without costs.

Rule discharged without costs.

COURT OF QUEEN'S BENCH.

Easter Term, 1850.

REG. v. CHILTON.

Interpleader—Rule 39—Sects. 78 & 118 of 9 & 10 Vict. c. 95.

By rule 39 it is directed, that "when any claim shall be made to or in respect of any goods or chattels taken in execution under the process of any court holden under the authority of the said act, or in respect of the proceeds or value thereof, by any landlord for rent, or by any person not being the party against whom such process has issued, and summonses have been issued on the application of the officer charged with the execution of such process, such summonses shall be served in such time and manner as hereinbefore directed for a summons to appear to a plaint, and the claimant shall be deemed to be the plaintiff and the execution creditor; the defendant and the claimant shall, five days before the day on which the summonses are returnable, deliver to the said officer, or leave at the office of the clerk of the court, a particular of any goods or chattels alleged to be the property of the claimant, and the grounds of his claim, or, in case of a claim for rent, of the amount thereof, and for what period the same is claimed to be due."

A. had claimed goods seized by a bailiff in execution issued from the County Court at the suit of B. Summonses had been issued to A. and B. The notice under the above rule of practice was in the form following: "I, the undersigned, &c. do hereby give you notice that the several goods and chattels under-written (specifying them) are, and every one of such goods and chattels were, at the time of the seizing of the same, my own property and not the property of Ross."

It was held, first, that the judges were empowered to make such a rule of practice as above, under the powers given to them by the 78th section of the County Courts Acts.

And, secondly, that the County Court judge had rightly decided that the 39th rule of practice had not been complied with by particulars merely specifying the goods, and stating the amount of claim.

The grounds of the claim must be explicitly stated.

A RULE had been obtained, calling upon the judge of the Lambeth County Court, and upon one Cullum, who had obtained judgment and execution against one Ross in that court, to show cause why the judge should not proceed to hear a summons and adjudicate upon the merits of a claim made by one Tanner to the goods taken in execution under process by the said Cullum. It appeared that Tanner had claimed goods seized by the officer of the Lambeth County Court in execution of process issued by that court at the suit of *Cullum v. Ross*; and that, upon the application of the officer, summonses had been issued, under sect. 118 of

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9 & 10 Vict. c. 95, to Cullum and to Tanner; that, upon the appearance of the parties before the judge, it was objected, on the part of Cullum, that the claimant had not complied with the 39th rule of practice, as framed by five of the judges, under sect. 78 of the statute, which authorizes them "to make and issue all the general rules for regulating the practice and proceedings of the County Courts." It appeared that the notice given by the claimant, Tanner, was in the form following:—"I, the undersigned, &c. hereby give you notice that the several goods and chattels underwritten (specifying them) are, and every one of such goods and chattels were, at the time of the seizing of the same, my own property, and not the property of Ross." The learned judge decided that this was not a sufficient notice of the grounds of the claim to entitle the claimant to be heard. The present rule had consequently been obtained on the part of Tanner to compel him to hear the claim on the merits. The 39th rule of practice follows:

"Where any claim shall be made to or in respect of any goods or chattels taken in execution under the process of any creditor holden under the authority of the said act, or in respect of the proceeds or value thereof, by any landlord for rent, or by any person not being the party against whom such process has issued, and summonses have been issued on the application of the creditor charged with the execution of such process, such summonses shall be served in such time and manner as hereinbefore directed by the rules, and the summons to appear in a plaint, and the claimant shall be deemed to be the plaintiff, and the execution creditor the defendant; and the claimant shall, five clear days before the day on which the summonses are returnable, deliver to the said officer, or leave at the office of the clerk of the court, a particular of any goods or chattels alleged to be the property of the claimant, and the grounds of his claim, or in case of a claim for rent, of the amount thereof, and of what period the same is claimed to be due."

Ogle, on behalf of the judge, and *Ball*, on behalf of the execution creditor, showed cause.—It is a sufficient answer to the application to say that the judge has heard the claim. He is the proper authority to decide questions of practice in his own court, and he has decided this. But it is clear also that he decided it rightly, and that the notice was insufficient: (*R. v. The Justices of Derbyshire*, 6 Ad. & Ell. 885.)

Whitehurst and *Pearson*, contra.—This notice was a substantial compliance with the rule; and the rights of parties in these cases ought not to be defeated by mere special pleading objections, especially when every other remedy is taken away: (sect. 1.) That section requires the judge of the County Court to adjudicate on the claim, and he is bound to do so. It is not competent to him to impose the adoption of a peculiar form of notice as a condition precedent to the right of the claimant to be heard on the merits of his claim. If this 39th rule must be so construed, then the judges exceeded their authority in making it; if not, then

of the County Court was wrong in refusing to hear the [Lord CAMPBELL, C.J.—But this notice gives no information at all.] Yes; it gives all the information that can be lawfully required. It shows that the claimant demands the goods as being his own property, and not as being subject to a lien or any claim of that sort. Where is the limit to be put? These are courts for poor suitors; and how is a poor illiterate man to explain the nature of his title? Is he to give names of all the persons from whom he bought the goods? or must it be enough for him to say generally whether he is as a bailee merely, as landlord, or as owner. As to the competency of this court, no doubt the decision of the judge of the County Court upon a mere question of fact cannot be reviewed; but if he erroneously declines to hear a case upon a ground which involves a decision of a question of law—as the construction of a statute or the like—this court will compel him by *mandamus* on the merits: (*R. v. Kesteven*, 3 Q. B. Rep. 810; *R. v. Justices of Cornwall*, 6 Ad. & Ell. 886.)

Lord CAMPBELL, C. J.—I am of opinion that this rule ought to be discharged. I think that the judges were acting with propriety in making this rule of practice, and that the right conclusion has been put upon it by the learned judge of the County Court. The words of the rule are, that the claimant shall have a particular of any goods or chattels alleged to be the property of the claimant, and in this notice the goods are alleged to be the property of the claimant; but the rule adds, “and the grounds of the claim, or, in case of a claim for rent, of the amount thereof, and what period the same is claimed to be due;” so that when a claimant does not claim as landlord, he is still to give the grounds of his claim.

Here the notice simply alleged that the goods were the property of the claimant, but did not give the grounds of the claim; and I think the judges did very wisely, in framing the rule, to require such information to be given as would enable the judgment creditor to make inquiries into fraudulent claims that are so apt to defeat the just rights of execution creditors.

TESON, J.—I do not think there can be any doubt in this case. The proceeding here is quite analogous to that under the Interpleader Act, under which the sheriff, when a claim is made in execution, takes out an interpleader summons to a judge; and we always require the claimant to state how and on what ground he makes his claim.

WHITMAN, J.—Clearly the rule requires something more to be done than claiming the goods; and Mr. Whitehurst was necessarily driven to say that the judges had no power to make the rule, but that the power given by the act is to make “all general orders regulating the practice and proceedings of the County Court;” and surely this is a proceeding in the County Court.

Rule discharged with costs.

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Easter Term, 1850.

JESSOP v. CRAWLEY AND OTHERS.

Interpleader—Practice—Jurisdiction.

By sect. 118 of 9 & 10 Vict. c. 95, it is enacted, "that if any claim be made to or in respect of any goods or chattels taken in execution under the process of any court holden under this act, or in respect of the proceeds or value thereof, by any landlord for rent, or any person not being the party against whom such process has been issued, it shall be lawful for the clerk of the court, upon application of the party charged with the execution of such process, as well before as after the action brought against such officer, to issue a summons calling the said court as well the party issuing such process as the party making such claim, and thereupon any action which shall have been brought in any of her Majesty's Superior Courts of Record, or local or inferior court, in respect of such claim, shall be stayed in the court in which such action shall have been brought, or any other court, on proof of the issue of such summons, and that the goods or chattels were so taken in execution, may order the party so charged to pay the costs of all proceedings had upon such summons after the issue of such summons out of the County Court; a judge of the County Court shall adjudicate upon such claim, and make such order between the parties in respect thereof, and of the costs of the proceedings, as to him shall seem fit, and such order shall be enforced in like manner as any order made in any suit brought in the County Court."

Summonses had been issued under this section in a case of a debt claim, and at the hearing it was objected that no sufficient notice had been served by the plaintiff of his grounds of claim under rule 3 of the County Court Rules. The judge held the objection to be fatal, and decided that the goods were those of the defendant in the original suit, and liable to the process of the court.

An action was brought against the officer of the County Court for seizing and selling these goods, and on a motion to set aside the proceedings in such action:

Held, that the Judge of the County Court having decided against the claim, that decision was conclusive, and that no action would lie against the officers for breaking the house or taking the goods, unless there was excess of violence in such breaking or taking.

This court will not entertain an appeal from the decision of the County Court.

WOOD had obtained a rule to rescind an order of Coleridge J., setting aside the writ of summons and all subsequent proceedings in this action as against two defendants, Smedley and

rtlett, who were respectively the high bailiff and bailiff of a unty Court.

The action was in trespass for breaking and entering the intiff's house, and seizing his goods; and the application to set ide the proceedings was made to the learned judge at chambers, der sect. 118 of 9 & 10 Vict. c. 95, which provides "that if y claim shall be made to or in respect of any goods or chattels ken in execution under the process of any court holden under is act, or in respect of the proceeds or value thereof, by y landlord for rent, or by any person not being the party ainst whom such process has issued, it shall be lawful for e clerk of the court, upon application of the officer charged with e execution of such process, as well before as after any action ight against such officer, to issue a summons calling before e said court as well the party issuing such process as the ty making such claim, and thereupon any action which shall e been brought in any of Her Majesty's Superior Courts of ord, or in any local or inferior court, in respect of such claim, ll be stayed, and the court in which such action shall have been ight, or any judge thereof, on proof of the issue of such mons, and that the goods and chattels were so taken in ution, may order the party so bringing such action to pay the s of all proceedings had upon such action after the issue of such mons out of the County Court; and the judge of the County rt shall adjudicate upon such claim, and make such order een the parties in respect thereof, and of the cost of the pro- ings, as to him shall seem fit, and such order shall be enforced ke manner as any order made in any suit brought in such t."

appeared by the affidavits brought before the learned judge, t a summons had been issued out of the County Court, iring the present plaintiff to appear and substantiate his claim he goods in question, which had been taken in execution by officers of the County Court, under process issued from that rt at the suit of one Crawley against a brother-in-law of the ent plaintiff. Upon the hearing of that summons, an objection made to the notice served by the plaintiff of the grounds of claim under the 39th rule of practice, and the judge of the unty Court held the objection fatal, and decided that the goods e the goods of the plaintiff's brother, the defendant in the suit he County Court. Under these circumstances, Mr. Justice ridge had set aside the proceedings in the present action as met the officers who had executed the process of the County rt.

ar John Bailey showed cause.—The adjudication in the County rt is final as to the property in the goods; and there is no ence that the officers at all exceeded their authority in their ner of entering the plaintiff's house for the purpose of taking e goods: (*Tinkler v. Hilder*, 18 L. J. 429, Exch.)

ood, contra.—In *Tinkler v. Hilder* the decision turned upon

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another point. The opinions expressed by the judges on this subject were extra-judicial; and Platt, B., differing from the majority, seemed to think that an action of trespass was not maintainable by the decision of the County Court upon the claim to the land. That is in accordance with the view taken in *Hollier v. Marshall* (3 C. B. 334), and *Abbott v. Richards* (15 Mee. & W. 194.) The judge of the County Court could give no compensation for the trespass to the house.

LORD CAMPBELL, C. J.—If this action had been brought for assaulting the plaintiff, or committing any other outrage, brother Coleridge would never have made this order; but merely for entering the house in order to take goods which he longed to the execution-debtor, he was bound to make it. I give every respect for the opinion of Mr. Baron Platt; but I dissent from the majority of the Court of Exchequer in the case (*Tinkler v. Hilder*), that the proceedings in the action were stayed when the adjudication in the County Court is against the claimant, which differs this case from *Hollier v. Lawrie*, a different class of cases. It seems to me that the present case is within the words and spirit of the act.

PATTESON, J.—If the County Court judge had decided in favour of the claimant, then, perhaps, it is true that he could give compensation for the trespass, and that an action might be maintainable; but certainly it is not when the decision is against him; and this action was commenced before the judge had given any decision.

WIGHTMAN, J.—We are, in truth, asked to give an appeal from the decision of the County Court; for the argument is, that the decision is not conclusive. If we were so to hold, the interpleader summons would be defeated altogether.

COURT OF COMMON PLEAS.

Easter Term, 1850.

WHITEHOUSE v. OWEN.

False judgment—Costs.

Record of an Inferior Court showed that upon an issue upon nil, the jury found a verdict for the plaintiff for 14s. 8d., and for defendant as to the residue, and awarded costs to the plaintiff: that a writ of false judgment would not lie, because no costs had awarded to the defendant, in respect of so much of the issue as found for him.

It was not allowed on writs of false judgment to either party.

It was a writ of false judgment. The declaration was in debt for 39s. upon the common counts. Plea, *nil debet*. The verdict of the jury was entered on the record thus:—"The said doth owe to the said Whitehouse 14s. 8d.; and that as to the residue, the said Owen doth not owe any part thereof." On a writ of false judgment the court gave judgment for the plaintiff, and awarded costs.

It was in support of the writ.—A verdict is found for the plaintiff on this record as to the residue, and there ought to have been an award of costs to him in respect thereof: (*Gregory v. The Duke of Brunswick*, 3 C. B. 481.) This is a divisible issue: see *v. The Great Western Railway Company*, 8 M. & W. 856; and *v. Loaring*, 1 Exch. 375.)

It was, contra, was not called upon.

It was, C. J.—*Nil debet* is a denial that anything is due to the plaintiff, and that issue is properly found for the plaintiff. In actions for debt, the plaintiff seldom recovers the whole debt for which he sues, but costs have never yet been awarded against defendant for that reason. The argument of the defendant to the length of saying that in every such action the plaintiff is erroneous.

Judgment for the plaintiff.

It was then applied for costs, and said that he had not been able to find any authority for the statement in Chit. Arch. 525, that costs are not recoverable by either party upon a writ of false judgment. That the authorities there cited did not bear out that statement.

The 33 Geo. 3, c. 68, s. 3, and 34 Geo. 3, c. 58, seemed to show that it was in the power of the court to give them.

It was, C. J.—I know of no case in which costs have been awarded against a writ of false judgment, and I find from the books that it has been the practice to give them. *Scott v. Byc* (9 Moore, 649) is a writ of false judgment is a writ out of Chancery, and not analogous to a proceeding at common law, and that costs cannot be awarded thereon.

Costs refused.

COURT OF COMMON PLEAS.

Easter Term, 1850.

STONE (a Pauper) v. SMITH.

Pauper—Suggestion—Costs.

The plaintiff sued as a pauper in the Superior Court, and recovered more than 20l. in an action on contract. The cause of action was within the jurisdiction of the County Court.

Held, that the defendant is entitled to a suggestion.

Quære, may not a plaintiff sue in formâ pauperis in the County Court? (a)

A suggestion to deprive him of costs under the County Courts Act

MACAULAY showed cause against a rule to enter a suggestion to deprive the plaintiff of costs, he having recovered only at the last Derby assizes. 1. It was contended that the affidavit on which the rule was obtained did not clearly show that the plaintiff and defendant dwelt within twenty miles of one another. 2. It was contended that the plaintiff having sued as a pauper, still being a pauper, and the County Courts Acts contain a provision enabling a pauper to sue, and the expense of suing in the County Court being more than 4l., it would be a denial of justice to persons in such a condition, unless they could sue in the Superior Courts.

Whitehurst, in support of the rule, was not called upon.

By the COURT.—Upon the first point, the affidavit is reasonable, certain, although some gentlemen, by acute criticism, find some degree of uncertainty. And as to the exemption from suing in the County Court, on the ground of the plaintiff being a pauper, the statute has introduced no such exemption, and the Court has no authority to allow it. Besides, why should it be said that a party may not sue in the County Court *in formâ pauperis*?

Rule absolute.

(a) See the case of *Chinn* (a pauper) v. *Bullen*, *post*, p. 315. "The judges of the County Courts have jurisdiction to allow persons to sue in their courts *in formâ pauperis*, and within their jurisdiction paupers must sue in the County Courts, or upon motion for a suggestion they will be deprived of costs."

COURT OF COMMON PLEAS.

Easter Term, 1850.

LEWIS v. FARRANT AND ANOTHER.

Death of one of two defendants—Costs—Affidavit.

Where the death of one of the defendants is suggested on the record of a writ of trial, the affidavit to deprive the plaintiff of costs is properly entitled as a suit by the plaintiff against the surviving defendant only. The affidavit should negative that both defendants were not persons within the 9 & 10 Vict. c. 95, s. 128, so as not to give concurrent jurisdiction to the Superior Courts. And the affidavit is not sufficient if it merely negatives the fact of the surviving defendant being within section 128.

WILLER showed cause against a rule *nisi* to enter a suggestion to deprive the plaintiff of costs under the County Courts Act. The rule was drawn up upon reading the writ of trial and the affidavit of the surviving defendant. Upon the writ of trial the death of one of the defendants pending the action was suggested, but the affidavit did not negative any of the necessary exemptions as required by the deceased defendant at the time of the commencement of the suit. The affidavit was entitled as a suit by the plaintiff against the surviving defendant only. It was contended that the affidavit was not sufficient within 9 & 10 Vict. c. 95, s. 128: (*Dodd Wigley*, 1 Cox & Macrae, 213.)

Parson, in support of the rule.

by the COURT.—The affidavit is sufficient as to its title, but it is not to have alleged that the deceased defendant, at the time of the action brought, was not a person within section 128.

Rule discharged with costs.

COURT OF COMMON PLEAS.

Easter Term, 1850.

POLAND v. MILLER.

Suggestion—Amended affidavit—Practice.

The defendant applied to a judge at chambers for time to bring in roll that a suggestion might be entered. The affidavit was insufficient and the summons was dismissed. Judgment was then signed and execution issued. On an application to the court on amended affidavits, a rule was granted to set aside the judgment, &c., and for suggestion, the defendant paying the costs of the judgment, execution and of the rule.

LUSH showed cause against a rule calling on the plaintiff to show cause why final judgment and execution herein should not be set aside, and for leave to enter a suggestion on the roll to deprive the plaintiff of costs, and why the plaintiff should not pay the costs of this application.

This was an action on a bill of exchange for 13*l.* 17*s.* 6*d.* Summons had been taken out before a judge at chambers, for a stay of proceedings, that a suggestion might be entered, but the application was dismissed by Coleridge, J., on the 15th of March. An application was then made for a rehearing, on amended affidavits, which was refused. On the 23rd of March, judgment was signed and execution issued, and on the second day of April this rule was obtained. The affidavits produced in the present instance were insufficient in not stating the plaintiff's place of abode, so as to show that he lived within twenty miles of the defendant: (*Peterson v. Davis*, 1 Cox & Macrae, 148.) It was now contended that this was substantially the same application that had been made to the judge at chambers. The judgment was regular, and, under any circumstances, this rule could only be made absolute on payment of the costs of judgment and execution, and on this application. It was submitted, first, that the application was too late; secondly, that it did not come within the act; and thirdly, that, if made absolute, it could only be on those terms.

Byles, Serjt., in support of the rule, contended that a judge at chambers had no right to enter a suggestion on the roll; that the application is to stay proceedings, that the roll may be brought up with a view to entering a suggestion. That was the application which had been made in this case. It is now asked to set aside the judgment signed since the application to chambers, and to enter a suggestion: (*Pike v. Davis*, 6 M. & W. 456.) This is not a rule for costs. The plaintiff knew all the facts of the case, and that

case within the County Courts Act. This was an erroneous point.

SSWELL, J.—I think that this rule must be made absolute, the terms mentioned by Mr. Lush, namely, the payment of costs of the judgment and execution, and of this application. On the defendant's application to chambers, the judge did not give his opinion about his right to a suggestion, and it is a strong point that it is not the practice to grant leave to enter a suggestion in chambers, but only to grant time for that purpose. We do not, therefore, think that a party is precluded from coming to the court to make such an application. But, having failed in his summons to the judge, the plaintiff was at liberty to go on regularly to judgment and issue execution. *Rule absolute.*

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HOULDEN v. SMITH.

Trespass—Excess of jurisdiction—9 & 10 Vict. c. 95.

That a district County Court, established under stat. 9 & 10 Vict. is liable to an action of trespass for false imprisonment, for an act done by his command and authority, when he has no jurisdiction, although a mistake of law.

That if imprisonment being made without jurisdiction, the defendant must be taken to be aware of the want of jurisdiction, and is, therefore, liable. In pleading the general issue under 21 Jac. 1, c. 12, and 42 Geo. 3, s. 6, the plea must be stated to be "by statute."

THIS was an action of trespass and false imprisonment, to which the defendant pleaded not guilty, and another plea, which was disproved, and upon which nothing turned. The cause was to be tried at the Summer Assizes, 1848, for the county of Lincolnshire, before Parke, B., and a verdict was found for the plaintiff, damages 60*l.*, subject to the opinion of this court upon a point of law.

CASE.

TWO years previously to, and also at the time when he was arrested, as hereinafter mentioned, the plaintiff had resided in his dwelling-house in the Newmarket Road, in Cambridge, in the county of Cambridge; which dwelling-house is situated out of the district assigned, under 9 & 10 Vict. c. 95, to the County Court for the county of Lincolnshire, held at Spilsby, in the county of Lincoln, and

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which is hereinafter described and referred to by the description of and as the Spilsby Court. For the last twenty years, the plaintiff had neither dwelt or carried on any business except in the county of Cambridge, which now is, and always was, out of the district assigned to the Spilsby Court as aforesaid, and he never dwelt or carried on any business within the limits of the said district.

On the 8th of July, 1847, an order was made by the Spilsby Court, whereof the defendant was judge, giving leave to C. Y. and T. M. to summon the plaintiff to that court in an action on contract, &c., the cause of action in which arose within the limits of the district assigned to the said Spilsby Court. On the 20th of July, 1847, the plaintiff was at Cambridge, and out of the limits of the said district assigned to the Spilsby Court, served with a summons, issued out of that court, to appear at the Spilsby Court on the 18th of August then next, to answer the said C. Y. and T. M. in an action in the said summons, described as an action on a contract, &c.

The plaintiff not having appeared in pursuance of the said summons so served upon him, and the service of such summons having been duly proved before the Spilsby Court, it was adjudged by the defendant, as judge thereof, that the said C. Y. and T. M. should, in the said action, at their suit, recover against the plaintiff 11*l.* 13*s.* for debt, and 4*l.* 15*s.* for costs, to be paid forthwith to the clerk of the said court. And a judgment order accordingly was, at Cambridge, and out of the limits of the said district assigned to the Spilsby Court, served on the plaintiff. The plaintiff did not pay the said sums as required by the judgment order, any part thereof, and a warrant of execution was issued against his goods for the same out of the Spilsby Court, and was afterwards sent, together with a warrant thereto annexed, under the hand of the high bailiff, and seal of the said Spilsby Court, to the clerk of the County Court of Cambridgeshire, being a court constituted and held at Cambridge aforesaid, in and for the county of Cambridge, under and by virtue of the said statute, within the limits of the district, assigned to which court the said plaintiff and his goods were then believed to be, and was by him served with the seal of the said Cambridge Court. To this warrant of execution the high bailiff of the Cambridge Court, on, &c., made return to the high bailiff of the Spilsby Court a return of *nulla bona*. On the 21st of September, a summons in the said action in the Spilsby Court was issued out of that court, and under the seal thereof whereby the plaintiff was required to appear at the Spilsby Court on, &c., to be then and there examined by the judge of the said court, touching his estate and effects, and the manner and circumstances under which he contracted the debt, which was the subject of the said action, &c., and as to the means and expectation he had of discharging the said debt and costs, and as to the disposition he might have made of any property. And was also required to take notice that if he did not appear in obedience to that

mons, he might, by order of the Spilsby Court, be committed to the common gaol at Spilsby. On the 27th of September this summons was, at Cambridge, personally served on the plaintiff. On the 7th of October the plaintiff having wholly disregarded the summons, and not appearing or attending at the Spilsby Court in pursuance thereof, nor having alleged any excuse for not doing so, the defendant then being the judge of the said court, &c., *bonâ fide* believing that he had power and authority to do so, made in his own handwriting, in the minute book of the said court, a memorandum and order in writing in the said action in that court, whereby it was ordered and directed that the plaintiff should, for contempt in not attending the said court, in pursuance of the said summons, be committed to Cambridge Gaol for fourteen days. And accordingly, by the direction and authority of the defendant, a warrant of commitment was issued out of the Spilsby Court against the plaintiff. And the high bailiff of the said court made and annexed to such warrant a warrant under his hand, and under seal sealed with the seal of the said court, which said warrant of commitment, with the said last-mentioned warrant annexed thereto, but without any other warrant or document annexed thereto, he, on the 23rd of October, delivered to the clerk of the Cambridge Court, who sealed and stamped the said warrant of commitment with the seal of the Cambridge Court, and delivered it to the high bailiff of that court, who, under colour and pretext of the said warrant of commitment, and at Cambridge, took and arrested the plaintiff and imprisoned him in a certain gaol in Cambridge, where he was kept and detained in custody until he was afterwards, on the 9th of December, by writ of *habeas corpus*, taken before Justice, J., then being one of the justices of the Court of Queen's Bench, by whom the plaintiff was, after hearing counsel on both sides, discharged out of custody, &c. And on the 23rd of February, 1848, the present action of trespass and false imprisonment was commenced by the plaintiff against the defendant.

The question for the opinion of the court was, whether, with reference to all the foregoing facts, and to the evidence admissible under the several pleas, the plaintiff was entitled to maintain his action. If the court should be of opinion that he was so entitled, then the verdict, which was found for the plaintiff, was to stand; but if of a contrary opinion, then a nonsuit was to be entered.

Watson (with him *Naylor*) for the plaintiff.—The power of a Judge of the County Court is defined by the act. The judge is a trespasser if he proceed otherwise than as the act allows. If he is erroneously within his jurisdiction, no doubt trespass will not lie, but if he act in a matter wherein he has no jurisdiction, his action as a judge cannot protect him. The powers and obligations of the judge rest upon the statute: (stat. 9 & 10 Vict. c. 95, s. 3, 61, 98, 99, 102, 103, 104.) Here, if there had been a power of committal at all, the committal should have been to the Spilsby and not to the Cambridge Court. This is just as if in civil proceedings a judge should order the defendant to be transported, or,

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as if the judges of the Court of Common Pleas should hold pleas in a criminal matter. The defendant had no more power to commit the plaintiff to a gaol in Cambridge than to a gaol in the West India. Jurisdictions created by statutes are limited by the directions of the statute creating them: (*Andrews v. Morris*, 1 Q. B. 3; *Carratt v. Morley*, *ib.* 19; *Watson v. Bodell*, 14 M. & W. 51) where the observations of Parke, B. are closely in point. *Thomas v. Hudson*, *ibid.* 353; *Clark v. Woods*, 2 Exch. 308. [COLERIDGE, J.—Suppose between the summons and hearing the plaintiff had changed his residence, then this proceeding would have been correct.] The plaintiff might then have been taken under the 104th section. But no such facts are found (*Calder v. Halket*, 3 Moore P. C. 28; *The Marshalsea case*, 1 Rep. 76; *Smith v. Bouchier*, 2 Stra. 993; *Hammond v. Howell*, 2 Mod. 218; *Beaurain v. Sir William Scott*, 3 Camp. 388; *Miles v. Seare*, 2 W. Black. 1141; *Bushell's case*, 1 Mod. 117; *Trotter v. Huntingdon*, Hard. 480.) Even if the defendant were protected in law, he has no defence upon this record, because no justification is pleaded. The plea of the general issue will not avail in any supposed defence upon the ground of the defendant's judicial character. By making the entry in the book, and issuing the warrant, the defendant is *primâ facie* a trespasser. In all the precedents having any analogy to this case the defence has been pleaded: (*Mostyn v. Fabrigas*, Cowp. 161; *Smith's L. C.* 34; *Holroyd v. Breare*, 2 B. & Ald. 473; *Sir Thomas Picton's case*, 30 Howell's St. Tr. 751 (per Ellenborough, C. J. in the course of the argument); *Taffe v. Downes*, 3 Moo. P. C. 36, n.; *Groom v. Burwell*, 1 Lord Raym. 454.) The only case which seems contrary is *Dicas v. Lord Brougham* (6 C. & P. 249); but the dictum of Lyndhurst, C. B. in that case was unnecessary to the decision, and no reason is given in support of it.

Worlledge (with him *O'Malley*) for the defendant.—The defence is not that an act *primâ facie* wrongful is justified, but that the defendant is, by reason of his character of judge, irresponsible. *Dicas v. Lord Brougham*, as reported in 1 M. & Rob. 309, is a conclusive authority that this defence is open under the plea of *not guilty*. In giving judgment that the warrant should issue, the defendant was acting judicially, and that which is done judicially is not a trespass. So in *Buron v. Denman* (2 Exch. 167), the defendant took his verdict upon the plea of the general issue. A special plea setting forth the office of the defendant, and the other facts, would have been bad on special demurrer, as amounting to the general issue: (*Tunnor v. Morris*, 2 Cr. M. & R. 298 (per Abinger, C. B.); *Tinsley v. Nassau*, Moo. & M. 52; *Le Caux v. Eden*, 2 Dougl. 594.) Except for his judicial character, the defendant would be liable for the excesses or mistakes of his officer quite as much as for his acts in obedience to orders: (*Brown v. Copley*, 2 D. & L. 332.) A judge of a Court of Record is not liable for his judicial acts, though in excess of jurisdiction: (in *Garnett v. Ferrand*, 6 B. & C. 611 625, all the cases are collected; *Olliett v. Bessey*, Sir T. Jones

4; *Gwynn v. Poole*, 2 Lutw. 935; *ib.* 1566.) Even if liable at all, it can only be upon clear proof that he knew of the excess, rather of the absence of jurisdiction: (*Lowther v. Earl Radnor*, East, 113, 119; *Truscott v. Carpenter*, 1 L. Raym. 229; *Pike v. Water*, 3 Bing. 78; *Calder v. Halket*, 3 Moo. P. C. 28; *Robinson Lenaghan*, 2 Exch. 333.) Here the case finds that he *bonâ fide* believed that he had jurisdiction. Under sects. 98, 99, the judge could have had jurisdiction if the plaintiff resided at Cambridge, or carried on his business at Spilsby. The facts, therefore, may have been such that the defendant was satisfied that this was the real state of the case, and, upon the evidence before him, jurisdiction may have been proved. The plaintiff did not appear to dispute the jurisdiction, and the defendant had therefore no means of covering that he had no jurisdiction before he made the order committal; all that is requisite, under sects. 27 and 91, and *reg.* No. 33, may have been proved without the want of jurisdiction appearing. If the plaintiff refused to appear and plead to the jurisdiction, he ought to suffer the consequences. Sect. 139, which protects the other officers from actions, does not mention the judge, as though the Legislature thought it impossible that he could be liable. Knowledge by the defendant of his want of jurisdiction must be positively found, and not only inferred. (He is cited, also, to *Ackerley v. Parkinson*, 3 M. & S. 411; *Rex v. White*, Rep. tem. Hardwicke, 42; *Basten v. Carew*, 3 B. & C. 649; *Wright v. Marshall*, Hob. 63.)
Watson, in reply, cited statute 9 & 10 Vict. c. 95, ss. 60, 103, & 124; *Terry v. Huntingdon*, Hard. 480; *Wingate v. Wade*, M. & W. 739.
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JUDGMENT.—February 26.

PATTESON, J., delivered the judgment of the court. (a)
 This was an action of trespass and false imprisonment against the defendant, the judge of the County Court of Lincolnshire. The defendant pleaded "Not guilty," but not saying "by statute;" and also a plea of want of notice of action. The notice of action was proved at the trial. The facts appear to be that the plaintiff, being resident in Cambridgeshire, was sued in the County Court at Spilsby, in Lincolnshire, by a special order of the defendant, under the 60th section of stat. 9 & 10 Vict. c. 95. The plaintiff was served with the summons in Cambridgeshire, and not appearing, judgment was obtained against him by default at the court at Spilsby on the 18th of August, 1847; a judgment order was served on the plaintiff in Cambridgeshire on the 25th of August, and a warrant against the goods of the plaintiff within the jurisdiction of the Spilsby Court was issued on the 14th of September, which was transmitted under the 104th section of the act, to the County Court of Cambridgeshire, and returned "no effects." So far the

(a) Patteson, Coleridge, and Wightman, JJ. Lord Denman, C.J., was absent from the position.

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proceedings were all regular. On the 21st of September, a summons was issued by order of the defendant, calling upon the plaintiff to appear at the Spilsby Court on the 7th of October, to be examined as to his not paying the debt and costs, and as to his estate and effects. This summons was without jurisdiction, for the 98th section, which authorizes the issuing of such a summons, directs it to be issued by the County Court within the limits of which the party shall *then* dwell or carry on his business, which, in this case, was the County Court of Cambridgeshire; for in that county only the plaintiff dwelt and carried on his business during the whole of these proceedings. This summons was served on the plaintiff in Cambridgeshire on the 23rd of September; on the 7th of October the plaintiff did not appear in the County Court of Spilsby, and the service of the last-mentioned summons having been proved to the defendant, as judge of the court, *bonâ fide* believing that he had power and authority to do so, made a minute in the minute-book of the court, whereby it was ordered that the plaintiff should, for contempt in not attending, be committed to the Cambridge Gaol for fourteen days; a warrant was made out accordingly, and he was so committed. That this commitment was without jurisdiction is plain; that the defendant ordered it under a mistake of the law, and not of the facts, is equally plain; for it is impossible that he could be ignorant that the plaintiff dwelt and carried on his business in Cambridgeshire, the serving of all the processes having been proved to have been made therein, and the defendant having originally specially allowed the plaint to be made in his court, within the jurisdiction of which the cause of action accrued, the defendant, the now plaintiff, residing in Cambridgeshire. This case is not within the principle of *Luther v. Earl Radnor* (8 East, 113), and *Gwynn v. Poole* (in the Appendix to 2 Lutwych, 1565), where the facts of the case, though subsequently found to be false, were such as, if true, would give jurisdiction, and where it was held that the question as to jurisdiction there must depend on the state of facts as they appeared to the magistrate or judge assuming to have jurisdiction. Here the facts of the case which were before the defendant, and could not be unknown to him, show that he had no jurisdiction; and his mistake in the law, as applied to those facts, cannot give him even a *primâ facie* jurisdiction or semblance of it. The only questions, therefore, are, whether the defendant is protected from liability at common law, being and acting as a judge of a Court of Record, in which case the plea of not guilty would be sufficient; or whether he is protected by the provisions of any statute, and if so, whether he can take advantage of such statute, having omitted the words "by statute," in his plea. As to the first question, although it is clear that the judge of a Court of Record is not answerable at common law, in an action for an erroneous judgment, or for the act of any officer of the court, wrongfully done, not in pursuance of though under colour of the judgment of the court, yet we have found no authority for saying that he is not answerable in an action

an act done by his direction or authority where he has no jurisdiction. Here the defendant had not only no jurisdiction to commit the plaintiff to the gaol of Cambridgeshire, but he had no jurisdiction to summon him to show cause why he should not pay the debt. The case of *Dicas v. Lord Brougham* (1 M. & Rob. 29), was cited, but it is plain that the order of commitment was made by the defendant, the Lord Chancellor, was not void, being without or in excess of jurisdiction; the question was, whether it was irregular or not, and a mere irregularity clearly could not form the ground of an action. *Holroyd v. Breare* (2 B. & A. 3); *Tunnor v. Morris* (2 Cr. M. & Ros. 298), and other similar cases, turned on the question whether the person doing the wrongful act was so the servant of another as to make that other answerable for the act that was done; and it was held that an officer was not such a servant to the judge of the court. But none of the cases turned on the want of jurisdiction. We cannot, therefore, hold the defendant in this case protected from liability at common law. Is he, then, protected by any statute? We find no statute give such protection. The stats. 21 Jac. 1, c. 12, and 42 Geo. 3, s. 6, enable the defence, where it exists, to be given in evidence under the general issue; but they do not protect a party acting without jurisdiction; and now, even, the privilege of pleading the general issue only, is coupled with the qualification that the plea must be stated to be "by statute," which words are omitted here. Judgment must, therefore, be for the plaintiff.

Judgment for the plaintiff.

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1850.

Jurisdiction—
Liability of
Judge.

COURT OF COMMON PLEAS.

Easter Term, 1850.

KIRBY v. HICKSON.

Suggestion—Sufficiency of affidavit.

An affidavit for a rule to enter a suggestion to deprive the plaintiff of costs under 9 & 10 Vict. c. 95, s. 129, stated, "that the plaintiff dwells in Keppel-street, Russell-square, in the county of Middlesex, within twenty miles of the defendant, who dwells at 65, Park-street, Russell-square."

It was held, not to be sufficient, inasmuch as it did not distinctly state that plaintiff and defendant resided within twenty miles of one another. The Court will not take judicial notice of distances. The test of sufficiency of such an affidavit is, whether perjury could be maintained upon it.

The affidavit should state explicitly that the residence of the plaintiff is situate within twenty miles of the residence of the defendant.

DATTERSON showed cause against a rule obtained for leave to enter a suggestion to deprive the plaintiff of costs. The

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Affidavit.

verdict was for 5*l.* 16*s.*, and the question was whether the affidavit sufficiently showed that the plaintiff dwelt within twenty miles of the defendant. The affidavit stated that "*the plaintiff dwells in Keppel-street, Russell-square, in the county of Middlesex, within twenty miles of the defendant, who dwells at 65, Park-street, Russell-square.*" It was contended that this was not sufficiently certain. *Peters v. Davis* (1 Cox & Macrae, 148), and *Johnson v. Ward* (18 L. J. 255, C. P.), were cited.

WILDE, C. J.—In *Johnson v. Ward* the affidavit was better than this; although we may have personal knowledge of certain localities we cannot take judicial notice of them.

Kay, in support, contended that *Johnson v. Ward* was clearly distinguishable from this; there the statement was that the defendant dwelt within twenty miles of the County Court; and cite *Hayter v. Fish* (1 Cox & Macrae, 197.)

WILDE, C. J. (after referring to that case)—I cannot distinguish the principle of *Hayter v. Fish* from the present case. I do not think the attention of the court was called to this case in the case which was decided the day before yesterday: (*Stone v. Smith*). The cases are inconsistent; by which are we to abide?

TALFOURD, J.—You first state that the plaintiff lives within twenty miles of the defendant, you then state their residences, but you do not state that those residences are within twenty miles of each other; the question is, can we, by coupling the two statements, make the affidavit sufficient?

WILDE, C. J.—I think in all the cases the main consideration should be, could a man be successfully indicted for perjury on the statements made in the affidavit. I think on this affidavit he cannot, if he could show that they had been within twenty miles of each other for even a short space of time, although resident at considerable distance. And this case cannot, I think, be decided but in accordance with that which was heard before the whole court yesterday.

Rule discharged with costs.

BAIL COURT.

*Hilary Term, 1850.**Ex parte PAYNE, Re PAYNE v. GARRATT.*

indiction — Building Society, 6 & 7 Will. 4, c. 32. — Clause to refer disputes.

of the rules of a Building Society, duly enrolled under the 6 & 7 Will. 4, c. 32, provided that all matters in dispute should be referred to two of Her Majesty's Justices of the Peace, according to the provisions of the 10 Geo. 4, c. 56, s. 27.

on a motion for a mandamus to the judge of one of the County Courts to proceed and hear a plaint brought by a member of the society against one of its officers :

that sect. 4 of 6 & 7 Will. 4, c. 32, incorporating the provisions of 10 Geo. 4, c. 56, ss. 27, 28 & 29, and the above-mentioned rule, took away the right of action.

In this case a rule had been obtained, calling upon the judge of the County Court of Bedfordshire, holden at Chesham, to show cause why a mandamus should not issue, commanding him to proceed and hear a certain plaint in a cause of "Payne v. Garratt." The facts of the case appeared from the affidavits to be as follows: The plaintiff was a member of a certain building society, and the defendant was one of its officers. By the 25th rule of the society, it was, amongst other things, provided, "that all matters in dispute should be referred to two of Her Majesty's justices of the Peace, according to the provisions of the 10 Geo. 4, c. 56, s. 27, which enacts, "that provision shall be made by one or more rules of every such society, specifying whether a reference of every matter in dispute between any such society, or any person acting under them, and any individual member thereof, or person claiming on account of any member, shall be made to such of His Majesty's justices of the peace as may act in and for the county in which such society may be formed, or to arbitrators to be appointed in manner thereafter directed," &c. The section then proceeds to provide for the appointment of arbitrators and the mode of enforcing the award. (a)

(a) The 28th section enacts, "that if by the rules of any such society it is directed that any matter in dispute as aforesaid shall be decided by justices of the peace, it shall and may be lawful for any such justice, on complaint being made to him of any refusal or neglect to comply with the rules of such society by any member or officer thereof, to summon the person first named in such complaint to appear at a time and place to be named in the summons; and that upon his or her appearance, or in default thereof upon due proof on oath of the service of such summons, it shall and may be lawful for any two justices to proceed to hear and determine the said complaint according to the rules of the said society; and in case the said justices shall adjudge any sum of money to be paid by such person against any such complaint shall be made, and such person shall not pay such sum of money to the justices, and at the time specified by such justices, they shall proceed to enforce their award in

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Some disputes arose, in consequence of which Payne withdrew from the society, and levied a plaint against the public officer to recover the amount of two shares subscribed for and withdrawn according to the rules. The demand was under 20*l*. The judge refused to hear the plaint, considering that he had no jurisdiction and the present rule was obtained.

T. W. Saunders showed cause against the rule.—A mere agreement or covenant to refer matters to arbitration would not oust a court of jurisdiction. *Cates v. Knight* (3 T. R. 442) and *Thompson v. Charnock* (8 T. R. 139), do not apply. In this case the jurisdiction of the courts is taken away by the several enactments relating to matters of this nature. The 4th section of the *Act for the Regulation of Benefit Building Societies*, 6 & 7 Will. 4, c. 32, enacts, that all the provisions of the Friendly Society Acts, 10 Geo. 4, c. 56, and 4 Will. 4, c. 40, so far as the same or any part thereof might be applicable to the purpose of any benefit building society, and to framing, certifying, enrolling, and altering the rules thereof, shall extend and apply to such benefit building societies, and the rules thereof, in such and the same manner as if the provisions of the said acts had been therein expressly re-enacted. The 28th, and 29th sections of 10 Geo. 4, c. 56, are therefore applicable to this case. In *Crisp v. Bunbury* (8 Bing. 394), which is a leading case upon this subject, the facts were these:—The action was by a depositor in a savings bank, against the trustees, treasurer, and manager, to recover deposits; and it was held, that the action did not lie, and that the only mode of proceeding was by arbitration. The language of the Savings Bank Act, 9 Geo. 4, c. 92, is not stronger than that of the above-mentioned sections. The object is, that in small matters expensive litigation should be avoided, and is equally as applicable to building societies as to savings banks. *Cuthill v. Kingdom* (1 Exch. 494), is not applicable, there it was held that an action was maintainable for arrears of fines due to the trustees, because the rule there relating to reference did not make it imperative to refer a matter such as was there in dispute, to arbitration.

Smythies, in support of the rule, contended that the courts of law had a concurrent jurisdiction. The case of *Cates v. Knight* was in point, and the court had there decided that the jurisdiction

the manner hereinbefore directed to be used in case of any neglect to comply with the decision of the arbitrators appointed under the authority of this act."

The 29th section enacts, "that every sentence, order, and adjudication of any justices under this act shall be final and conclusive to all intents and purposes, and shall not be subject to appeal, and shall not be removed or removable into any court of law, or restrained or restrainable by the injunction of any court of equity, and that no suspension, advocacy, or reduction, shall be competent."

(b) *Cates v. Knight* (3 T. R. 442), decided, that when an offence is created by statute with a penalty, the penalty may be sued for in the Superior Courts of Westminster. For the jurisdiction of those courts cannot be ousted but by express words or necessary implication. In the 25 Geo. 3, c. 51, having created penalties of 50*l*. and 10*l*., and having enacted that the offender should be sued for in any of the courts at Westminster, and provided that it should and might be lawful for justices of the peace, &c., to hear and determine the latter, with power to them to mitigate the penalties, &c. It was held that such proviso ousted the jurisdiction of the Superior Courts as to the 10*l*. penalty.

superior Courts could not be ousted, unless by express
by necessary implication. The expression used in the
ion of 10 Geo. 4, c. 56, is, "it shall be lawful for any
ces to proceed to hear the complaint." This gives juris-
to the justices, but does not necessarily oust this court
tion. This would come within the 58th section of the
ict. c. 95; the words there used are, "all pleas of personal
where the debt or damage claimed is not more than
those words are sufficiently extensive to include a case
resent.

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Building Society.

Cur. adv. vult.

JUDGMENT.

MAN, J., for ERLE, J.—Upon a rule for a *mandamus* to
of the County Court to proceed with this action, which
ght by a member of a Building Society, within the pro-
the 6 & 7 Will. 4, c. 32, against an officer of the society,
tended that, by section 4 of that statute, incorporating the
of the 10 Geo. 4, c. 56, ss. 27, 28, and 29, and by the
of this society, directing a reference of all disputes to
the peace, the right to bring this action was taken away;
of opinion that it is so. By those sections provision is
o be made by the rules, specifying whether disputes shall
d to justices or to arbitrators, and the decision upon such
is made final. These sections, and this rule, providing
ap, simple and speedy decision, oust the jurisdiction of
ary tribunals: (*Crisp v. Bunbury*, 8 Bing. 394; *Timms*
vs., 3 Q. B. 413.) In *Cuthill v. Kingdom* the action was
tainable, because the rule then relating to reference did
rise the matter of that action; but by the exception the
recognised. The 9 & 10 Vict. c. 95, does not operate to
the effect of these statutes from County Courts, or revive
f bringing actions there which had been taken away from
generally. The rule must therefore be discharged.

Rule discharged.

BAIL COURT.

Trinity Term, 1849.

Before Mr. Justice WIGHTMAN.

YATES v. PALMER.

Prohibition.

A party is not entitled to a writ of prohibition if, at the trial in the case below, he acquiesces in the proceedings, and the proceedings themselves are correct upon the face of them.

THIS was an application for a writ of prohibition to be directed to the judge of the County Court of Staffordshire, to restrain further proceedings in this cause, on the ground that they involved a title to land.

Pigott and Temple showed cause.

Ball, in support of the rule.

Cur. adv. vult.

The facts and arguments sufficiently appear in the following judgment, which was delivered (July 5) by

PATTESON, J.—In this case a rule was obtained by the defendant for a prohibition to the County Court of Staffordshire in a replevin suit. The ground of this rule is, that the title to the premises in respect of which the distress was made had been in question. It appears by the affidavit that the plaintiff did not know, or ought to have known, that the title would have been brought into question, but that neither party had taken any step under the 121st section of the 9 & 10 Vict. c. 95, to remove the cause from the County Court to a Superior Court having cognisance of title. The cause was tried in February last, and the verdict was given for the plaintiff. The defendant, at a subsequent court, moved for a new trial, but without success, but on neither occasion made any objection to the jurisdiction of the court. The costs were taxed, and the amount of damages and costs paid under protest, to save execution. The defendant proposed to make some further application to the County Court at the next sitting. All these proceedings took place in the vacation between Easter Term; no objection appears to have been made to the jurisdiction of the County Court until the present rule was obtained. Before entering into the question of jurisdiction, we turn upon sections 58 and 121 of the 9 & 10 Vict. c. 95, it

that a preliminary objection was made that the defendant, moved to show cause, was too late, as there was, in effect, to prohibit; the trial, verdict, judgment, and payment of costs and costs having been completed before the information was filed for, and no defect of jurisdiction appeared upon the proceedings. On the other hand, the case of *Roberts v. Humby* (W. 120), was cited, to show that where the application for a prohibition could not have moved earlier, it is not too late after execution although the want of jurisdiction does not appear upon the proceedings. Without pausing to inquire into the propriety of a prohibition, where nothing remained to be done, it is sufficient for the present purpose to observe, that it was agreed in this case, as in some of the former cases, that if the party makes no objection to the jurisdiction of the court whilst the case is proceeding, and acquiescing in that jurisdiction, and suffers the judgment to be made without protest, or as if the court had jurisdiction, and the actual payment of damages and costs, he is too late to move for a prohibition, even although he had no opportunity to move before, unless a defect appear on the face of the proceedings. On this ground, therefore, we think the rule should be discharged; and under the circumstances, the defendant can hardly have it made absolute, it will be discharged with costs.

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Rule discharged with costs.

COURT OF COMMON PLEAS.

Michaelmas Term, 1849.

CHINN (a Pauper) v. BULLEN.

Pauper—Costs—Suggestion.

Justices of the County Courts have jurisdiction to allow persons to sue in their courts in formâ pauperis, and in cases within their jurisdiction persons must sue in the County Courts, or, upon motion for a suggestion, will be deprived of costs.

CHINN had obtained a rule calling upon the plaintiff to show cause why a suggestion should not be entered upon to deprive him of costs, on the ground that he ought to have sued in the County Court. The action had been tried before Mr. J. at the first sittings for Middlesex in this Term, and the plaintiff had obtained a verdict, damages 10*l*.

CHINN now showed cause.—The power to sue in formâ

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—
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pauperis is given by stat. 11 Hen. 7, c. 12, but that statute only to proceedings by original writ, or by bill, and is therefore to proceedings in the Superior Courts. It may be that the act of Henry applies to all Courts of Record, and the County Court is now a Court of Record. This is so, but the act made it such, subject to certain regulations, and the act confers a privilege on paupers to sue. One of these regulations is, that the judges of the Superior Courts may make rules and orders which they have made no order in this matter. The County Court clearly does not contemplate any person suing in those courts who is unable to pay fees, for one of the clauses provides that the suitor shall pay the fees named in the schedule. Probably this was a *casus omissus*.

MAULE, J.—The 78th section of the County Courts Act provides that the judges of the Superior Courts shall have power to make rules for regulating the practice of the County Courts, and in any case not expressly provided for herein, on the said rules, the general principles of practice in the Superior Courts of Common Law may be adopted and applied at the discretion of the judges (that is, the judges of the County Courts) to act in proceedings in their several courts. This shows that the judges of the Superior Courts might, if they had thought fit, have made regulations respecting persons suing in the County Courts *pauperis*; then, as they have not done so, the latter part of the section provides that the general principles of practice in the Superior Courts may be adopted at the discretion of the judges of the County Courts—in their several courts. Now the practice of the Superior Courts is to exercise a discretionary power as to persons suing *in formâ pauperis*, and no regulation has been made on the subject, that practice may be adopted by judges of the County Courts.

Skinner, in support of the rule was not called upon.

WILDE, C. J.—This rule must be made absolute; if a person has a cause of action involving anything special in it, I apprehend he, like any one else, may still apply to the Superior Court to leave to sue there; but otherwise, if any class of persons shall sue to the cheap courts, it is a pauper, who is not to pay costs.

MAULE, J., WILLIAMS, J., AND TALFOURD, J., concur.
Rule absolute.

COURT OF COMMON PLEAS.

Michaelmas Term, 1849.

ELLIS v. WATT, Executor, &c.

Prohibition—Executor—Judgment quando—Summons suggesting assets.
 If the defendant, an executor, is served with a summons upon a *devastavit*, after a judgment of assets *quando acciderint*, notwithstanding there is no form of summons given by the rules drawn up by judges applicable to such a judgment, the court will not grant a prohibition.

Proper method of proceeding for assets received by the executor since plea pleaded is by summons, stating the judgment quando acciderint, suggesting assets after plea pleaded.

ANNELL, Serjt., moved for a writ of prohibition to the judge of the County Court of Wimborne Minster, &c. The plaintiff had sued the defendant, as executor of W. T. D. Trenchard, in the County Court, in September last, for the sum of 13*l.* 5*s.* 10*d.* due from his testator, and the defendant pleaded *plene administravit*, and the judge of the County Court adjudged that the plaintiff should recover the amount claimed *quando acciderint*, and 3*l.* 16*s.* for costs, to be paid forthwith by the defendant. Afterwards, in October, the defendant was served with a summons upon a *devastavit*, in the form of a writ by the judges; “for that you, the defendant, have withheld, and put to your own use divers goods and chattels which were the property of W. T. D. Trenchard, deceased, at the time of his death, and which came to the hands of you, the defendant, as executor of the said W. T. D. Trenchard, to be administered.” The judge had intimated his intention of entering into the defendant’s accounts, and adjudicating on them, and this was a ground for a writ of prohibition to restrain him from proceeding on the summons. It was contended that, as the form of the summons alleged generally that assets had come to the defendant’s hands without specifying that it was since plea pleaded to the original complaint, the proceeding was improper: (*Wms. Exors.* 1705; *Thomson v. Thomas*, 1 C. & M. 532.) The 9 & 10 Vict. c. 95, ss. 6, 7, 8, and 129, were then adverted to, and afterwards *Woodhams v. Manman* (1 Cox & Macrae, 231); and *Beswick v. Capper* (1 Cox & Macrae, 243.) The proceeding should have been in the form of a *sci. fa.* to have execution of the judgment, suggesting assets had come to the defendant’s hands since the judgment. The summons is a statutable substitution of the judgment, so that there would be a difficulty in the way of this application.

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Executor—
Prohibition.

MAULE, J.—The *devastavit* is a sort of *sci. fa.* The 60th section of 9 & 10 Vict. c. 95, makes it lawful for any executor or administrator to be sued in the County Court:—"and judgment and execution shall be such as in the like case would be given if issued in any Superior Court." In the Superior Courts the writ of *sci. fa.* lay to have execution of the judgment of assets *quando acciderint*. As the form given by the judges is not adapted to this case, the parties must make a form for themselves. If the form is faulty, the proceeding to correct it must be the same as in the Superior Courts, that is, by demurrer. I think the plaintiff had better amend the summons by inserting a statement of the judgment *quando acciderint*, and a suggestion of assets come to the defendant's hands after plea pleaded.

Per CURIAM.

Rule refused.

COURT OF EXCHEQUER.

Michaelmas Term, 1849.

WALKER v. WALL.

Suggestion—Affidavit—Practice.

On a motion for a suggestion to deprive the plaintiff of costs, if the defendant makes out a good *prima facie* case, and there appears to be reasonable grounds for entering a suggestion, it is sufficient.

ON a former day a rule had been obtained by *Barstow*, calling on the plaintiff to show cause why he should not bring the record for the defendant to enter a suggestion thereon to deprive the plaintiff of costs.

The action was tried before the Under Sheriff of Middlesex, and a verdict was found for the plaintiff, damages 9*l.* 10*s.* From the particulars of demand, it appeared that some of the goods for which the action was brought had been supplied in July, 1848. The defendant's affidavit stated that the residence of the defendant was the dwelling-house and place of business of the plaintiff was within the jurisdiction of the County Court of Surrey, within which the defendant resided at the time the action was brought, and that the cause of action arose wholly, or in some material point, within the jurisdiction, but it did not state the time the cause of action accrued.

Joyce, for the plaintiff, now showed cause.—The affidavit on which the rule was moved was defective. There are two objections; first, it does not aver that this was a plaint that might have

HE, D.—Your argument is, that the defendant's affidavit
to state that the cause of action arose within the jurisdiction
district County Court, as established under the late act,
of simply stating the County Court, which might mean the
County Court.

is the argument. (*Parker v. Crouch*, 1 Cox & Macrae,
cited.)

low, in support of the rule.—This affidavit is quite sufficient
purpose of obtaining a suggestion. It is sufficient to make
facie case, and if the plaintiff denies our statements, he
o traverse them and put his denial on the record. It can
be said that the old County Court was meant, when the
was upwards of 9*l*, and the jurisdiction of the old County
limited to 40*s*. And as to the other objection, that also
ered by the particulars annexed to the affidavit, by which
rs that the demand arose in 1848.

OCK, C. B.—This rule must be made absolute. The plaintiff
t deny that a district court was established in which the
ght have been sued for. The question is, is the defendant's
sufficient to satisfy the court that the action might have
ught in the County Court? I think it is.

HE, B.—If a good *prima facie* case be made out, and there
to be a probable cause for entering the suggestion, that is
t. The plaintiff may traverse the suggestion.

ERSON, B., and ROLFE, B., concurred.

Rule absolute.

COMMON PLEAS.

Michaelmas Term, 1849.

VINES v. ARNOLD.

Splitting demands—Abandonment of excess beyond 20l.

Where a plaintiff had a cause of action exceeding 20l. but nevertheless sued in a County Court for part only of his demand and recovered such part, and it did not appear at the County Court that the debt was part of a debt exceeding 20l., or that plaintiff had done anything to show that he abandoned the excess beyond 20l. :

Held, that he might still sue in the Superior Court for the excess, if above 20l.

DEBT for goods sold and delivered, and upon an account stated. *Pleas.*—1. Never indebted.

2. That before the commencement of the suit, and at the time of the entering of the plaint, and of the issuing of the summons hereafter mentioned, to wit, on the 16th day of January, 1848, the defendant dwelt within the district for which the Lambeth County Court of Surrey, held at Denmark-hill, Camberwell, was then, and still is holden, and within the jurisdiction of the court. And the plaintiff then dwelt within twenty miles from the defendant, and the plaintiff was not nor was the defendant an officer of that court; and the defendant was then indebted to the plaintiff, as well in the said moneys, and for and in respect of the said causes of action, in the declaration mentioned, as also in the sum of 17l. for the price and value of goods before then sold and delivered by the plaintiff to the defendant, at his request; and the plaintiff then had cause of one action against the defendant, as well for and in respect of the said moneys and causes of action in the declaration mentioned, as for the said 17l., and the same which arose within the jurisdiction of the said court, and the said cause of action then was for more than and exceeded the sum of 20l., and amounted in the whole to a large sum, to wit, 38l. 10s.; and the said cause of action then formed and constituted together and was an entire debt and demand against the defendant; and for the recovery of the whole of the same a plaint then might and could have been entered by the plaintiff against the defendant at the said County Court, under the statute made and passed in the session of Parliament held in the ninth and tenth years of the reign of our late the now Queen, intituled *An Act for the more easy recovery of Small Debts and Demands in England*; and he might by law and according to that statute have recovered the same in and by a plaint at action at his suit against the defendant in the said court, if the same

and the defendant, and the substance of the action intended
ought, according to the statute in such case made and pro-
And the plaintiff therein stated that the said action was
for the recovery of the said sum of 17*l*., and the
int was then numbered A. 245, according to the order
it was entered; and the said plaint being so entered
on, to wit, on, &c., a summons stating the substance
said action, and bearing in the margin thereof the same
as the said plaint was numbered, was, within the jurisdiction
said County Court, issued out of this court under the seal
at the suit of the plaintiff against the defendant, and
the defendant was summoned to appear at the Lambeth
Court of Surrey, to be holden at Denmark-hill, Cam-
on Thursday, the 3rd day of February, 1848, at the hour
ve at noon, to answer the plaintiff in an action of con-
recover the said sum of 17*l*.. And further, that he, the
nt, having appeared to the said action at the said County
according to and as required by the said summons, and
defended the action in the said County Court, such proceed-
thereupon had in that action and upon the said plaint in
irt, that afterwards, to wit, on Thursday, the 3rd day of
y, A. D. 1848, the same action came on to be tried in the
mbeth County Court of Surrey, at and within the juris-
of the said court, before George Chilton, Esq., the
hereof, at which time and place the plaintiff was duly, as
l by law, called upon to appear, but did not appear, and
endant there and then did appear, and then admitted the
se of action to the full amount claimed by the plaintiff, to
the full amount of the said sum of 17*l*.; and thereupon it
adged by the said court that the plaintiff should recover
the defendant the said sum of 17*l*. for his debt, together
costs of suit amounting to the sum of 8*l*. 8*s*. 8*d*. and is

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said judgment of the said court upon such plaint as aforesaid was and still is, according to the said statute, in full discharge of all demands in respect of the said cause of action, &c. &c. &c.

Replication to the second plea:—a traverse of the abandonment.

The particulars of demand in this action were:—"February 1847. Ten barrels of flour, 21*l*. 10*s*." Plaint was issued out of the Lambeth County Court (January 17, 1848,) for 17*l*., goods sold and delivered, and the particulars did not show that there was any larger debt or any abandonment of any part of the debt. The case came on for hearing on the 3rd of February, 1848, when the plaintiff did not appear, but the defendant did, and confessed the debt, and judgment was accordingly given for the plaintiff for 17*l*. The judgment was subsequently satisfied by the defendant. The plaintiff had, previously to the proceedings in the County Court, delivered an invoice to the defendant consisting of the item which he afterwards sued in the County Court (17*l*.), and also that which was now the cause of the action (21*l*. 10*s*.), and the total of the invoice exceeded 20*l*., but the defendant, when before the County Court, made no objection on this ground. It was contended, on behalf of the defendant, at the trial, before Coltman, J. at the London Sittings, in Hilary Term, 1849, that these facts it must be taken that the plaintiff had abandoned all demand beyond the 17*l*., which he recovered in the County Court, and a verdict was found for the plaintiff on the first issue, and for the defendant on the second issue; leave being reserved to the plaintiff to move to enter a verdict for 21*l*. 10*s*. on the second issue or for judgment *non obstante veredicto*.

A rule *nisi* having been obtained accordingly,—

Joyce showed cause.—The plaintiff, by the delivery of an invoice embracing the item sued for in the County Court, and also the item the subject of this action, showed that he had but one cause of action for the total, and was not entitled to divide it for the purpose of bringing two actions: (*Grimbley v. Aykroyd*, 1 Cox & Macrae, 79.) He might have sued in the Superior Court for the total, or in the County Court, by abandoning the excess beyond 20*l*. The 63rd section of the County Courts Act, prohibits the plaintiff from dividing his claim. [MAULE, J. Yes; for the purpose of bringing two or more suits in the County Court, but surely if a plaintiff submits to be nonsuited and withdraws his claim, he does not abandon the excess.] The levying of a plaint is *ipso facto* an abandonment. The latter words of the 63rd section are merely descriptive of the effect of the judgment, which is to be in full discharge of all demands, &c., and do not import that the judge is to pronounce a formal judgment to that effect. The latter part of the section could not have escaped the

(a) The 63rd section of the County Courts Act is as follows: "That it shall not be lawful for any plaintiff to divide any cause of action, for the purpose of bringing two or more suits in any of the said courts, but any plaintiff having cause of action for more than 20*l*. may abandon the excess, and thereupon the plaintiff shall, on proving his case, recover to an amount not exceeding 20*l*.; and the judgment of the court shall be in full discharge of all demands in respect of such cause of action, and entry of the judgment shall be made accordingly."

attention of the judges who framed the rules under the act, and they seem not to have thought any special form of judgment necessary in such a case, and have not given any such form. The jurisdiction of the County Court is derived from the statute, and unless the plaintiff abandoned the excess of his cause of action against the defendant beyond 20*l.*, the County Court had no power to deal with the case. The appearance of the defendant and his acknowledgment of the debt could not confer jurisdiction. It must be taken therefore that the plaintiff, knowing that he had a cause of action beyond 20*l.* when he sued in the County Court, abandoned the excess beyond the 17*l.* by suing in the County Court for that amount.

Hawkins in support of the rule.—The only question is, whether there was any evidence to prove the issue that the plaintiff did abandon the excess beyond the 17*l.* The evidence is, that the plaintiff did not appear at the hearing in the County Court, but that the defendant did and confessed the debt. There was not a word said by the plaintiff about abandoning any part of the debt due to him. The defendant might have objected to the judge that the demand in the County Court was part of a larger debt exceeding 20*l.*, and called upon him to nonsuit the plaintiff; or he might have applied to the Superior Court for a prohibition, as in *Simbley v. Aykroyd*. (b)

MAULE, J.—We think that there must be something done by the plaintiff to show that he abandons the excess beyond 20*l.*; and about that is done, the plaintiff ought to be nonsuited in the County Court. It is a good defence in the County Court that the plaintiff has proved a debt which the defendant has shown to be part of a larger debt exceeding 20*l.*, and the defendant is therefore entitled to the judgment of the court, unless the plaintiff abandons the excess. But the plaintiff ought to have the option of saying that he abandons the excess or that he will be nonsuited, or that he may sue for the whole in the Superior Court. To hold otherwise would lead to much mischief, for then in every case, even where it was doubtful whether the sum sought to be recovered by plaintiff in the County Court was part of a larger debt, it might be of 500*l.*, it would be said that the plaintiff, *ipso facto*, abandoned his demand of 500*l.*, and was barred by the judgment of the County Court from recovering more than 20*l.* when he attempted to claim his whole demand. That never could have been the intention of the Legislature. If the defendant does not choose to insist on a defence that he has at the County Court, that is his fault. If he chooses to insist upon it, the plaintiff must have his option either to allow the defence, pay the costs, and sue in the Superior Court, or to abandon the excess and recover part of a demand which was not within the jurisdiction of the County Court, but which was made so under section 63. The rule, therefore, must be

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(b) See ante, p. 79. The term "cause of action," used in the 63rd section does not mean a cause of action in one single entire contract, but should be interpreted "cause of one action."

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absolute to enter the verdict for the plaintiff for 21*l.* 10*s.* and issue.

TALFOURD, J.—I am of the same opinion; I think the legislature intended that there should be some act of abandonment of court, because a provision is made for an entry of the abandonment.

Rule absolute.

COURT OF QUEEN'S BENCH.

Trinity Term, 1850.

Re TOBY.

Costs of attorney—Preliminary business.

The 91st section of 9 & 10 Vict. c. 95, limiting the fee of an attorney "appearing or acting" on behalf of any person in the County applies only to the appearing and acting in court, and not to that done by the attorney in relation to the suit previously to the hearing. Overruling Ex parte Clipperton, re Green (1 Cox & 3 136.)

IN this case a rule had been obtained on behalf of an attorney of this court, calling upon Clifford Shirreff to show cause why an order made by Wightman, J., on the 5th of June, referring Mr. Toby's bill of costs to taxation, should not be rescinded and all proceedings thereon set aside, or why the Master should be at liberty to review his taxation of costs herein, and that Clifford Shirreff should not repay to John Toby the money which had been refunded to him under the Master's *allocatur*. This was obtained in Michaelmas Term, 1849, but had stood over until the judgment of the Court of Common Pleas in *Ex parte Keighley and Goodman* should be given. (a) Mr. Shirreff retained Mr. Toby to prosecute a suit for him in a County Court; and in that suit he recovered 11*l.* 8*s.* 7*d.* Mr. Toby then delivered his bill of costs, including charges for business done out of court before the commencement of the suit, and amounting altogether to 22*l.* 5*s.* Mr. Shirreff paid his attorney the amount which he claimed, in order to avoid an action; but he afterwards applied to Wightman J., who, by an order made on the

(a) See this case reported *ante*, p. 284.

ness done before the suit was commenced.

[*Scotland* showed cause. (b)—This question depends upon construction of sect. 91 of 9 & 10 Vict. c. 95, and considering act of that statute, viz., that the party himself should be the court, and that cheap and speedy justice should be tendered, the operation of the section ought not to be narrowed interpretation. That section limits the amount to be recovered appearing or acting on behalf of any other person in the said matter where the word "acting" means acting in regard to the suit, in reference to matters done before proceedings in the suit commenced. [LORD CAMPBELL, C. J.—It may be of the importance and of the highest benefit to the client, that there should be a deliberation before the suit is commenced; and the expensive and troublesome part of the proceedings may take place anterior to the commencement of the suit.] In *Ex parte Clipperton, re Green*, this court held that those words included all matters connected with a suit in court, whether preliminary or not. The decision is more in accordance with the intention of the legislature than the decision of the Common Pleas in the case of *Keighley* (1 Cox & Macrae, 284.) 2ndly. In this case preliminary items were allowed, although generally the tax proceeded upon the case *Ex parte Clipperton*. *ton*, contra.—The question is between the two decisions. It would not have been taxed but for *Ex parte Clipperton*.
Cur. adv. vult.

JUDGMENT.

LORD CAMPBELL, C. J., now delivered the judgment of the court.—This was an application to the court to rescind an order of taxation of the bill of costs of Mr. Toby, an attorney, for

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costs in the action, which sum was paid by the defendant Toby, the plaintiff's attorney. Mr. Toby sent in a bill of costs to his client, in which, after giving him credit for 11*l*. 8*s*. 7*d*., the balance and costs recovered from the defendant, there remained the 10*l*. 17*s*. 4*d*. due to Mr. Toby, which the client paid to him in full on the apprehension, as he says, of being sued for the amount. On the application to tax, and before the Master, Mr. Shirreff, the Master relied on the decision of this court in *Ex parte Clipperton* (1 Cox & Macrae, 136), in which it was held that, under the 91st section of the County Courts Act, an attorney was restrained from recovering more than 15*s*. for his services in a suit in one of the County Courts. A similar question subsequently arose in the Court of Common Pleas (*Ex parte Keighley*, 1 Cox & Macrae, 284), and, after consideration, that court then came to the conclusion that the taxing clause of that act applies only to appearing and acting as attorney in court, and not to his services out of court, and in visiting and in getting up the case. The 91st section is not very clearly worded. The object of the act was to enable parties to carry on suits for amounts not exceeding 20*l*. at a comparatively small expense, and as the words of the section are certainly capable of the construction put upon them by the Court of Common Pleas, and he may in some cases arise from the narrower construction adopted by this court in the case of *Ex parte Clipperton*, we feel disposed, on consideration, to adopt the same conclusion, more especially as it is most important that the practice should be uniform; and we think that the rule should be absolute, not for rescinding the taxation of the judge, but for a review of the taxation and repayment to Mr. Toby of any sum he may have been obliged to pay to Mr. Shirreff beyond what, on a review of the taxation, the court finds ought to have been paid.

Rule absolute to review taxation.

COURT OF EXCHEQUER.

Easter Term, 1850.

BROND v. CARY.

Practice—Suggestion.

*nisi to enter a suggestion to deprive a plaintiff of costs being
ted upon an affidavit, cannot be met by a counter affidavit simply
ing the facts stated by the defendant's affidavit, for upon those
he may take issue and go to trial.*

LLOR, on a former day, had obtained a rule to show cause
why a suggestion should not be entered upon the record to
the plaintiff of his costs.

Justice now showed cause.—This was an action to recover 25*l.*
upon the sale of the defendant's business. The cause
ied before the Chief Baron, and a verdict returned for
. The affidavit upon which the rule was granted states that
se of action arose within the jurisdiction of the County

It is often a question of considerable difficulty what is the
of action. The facts ought to have been stated, from which
art might have formed their opinion, it being a question of
ther than a question of fact. Another objection is, that the
ant states that the plaintiff, at the time of the commence-
of this suit, resided at a particular place. In the defendant's
it this is expressly denied, and it is sworn that he lived at
r and different place, which is stated in his affidavit.
E, B.—That is a traverse which we cannot try on an affi-

His affidavit states that the whole of the work and labour
me out of the jurisdiction.

LOCK, C. B.—You deny what they say; then go to trial
t. This court cannot try that question.

FE, B.—This court never refuses to allow the suggestion
there is an affidavit.

Rule absolute.

COURT OF EXCHEQUER.

Trinity Term, 1850.

SANGSTER v. KAY.

Suggestion—Affidavit—Carrying on business—Clerk in the Privy Council Office—Jurisdiction.

A clerk in the office of Privy Council residing in another district does not "carry on his business" at the Privy Council Office within the meaning of the County Courts Act, so as to bring him within the jurisdiction of the court of the district in which the office is situate.

The court will not take judicial notice of the situation of the Privy Council Office. It should be stated in the affidavit.

MARTIN, Q. C., showed cause against a rule obtained to enter a suggestion on the roll to deprive the plaintiff of costs. It was stated in the affidavit that the defendant lived at Brompton and attended as a clerk at the Privy Council Office, but the court would not take judicial notice, without its being expressly stated in the affidavit, that Brompton was within the jurisdiction of the Middlesex court, and the defendant's occupation as a clerk was clearly not a carrying on of business so as to bring him within the terms of the County Courts Act. *Buckley v. Hann* (1 Com. Macrae, 269) was an express decision to that effect.

Hawkins, contra.—Buckley v. Hann is distinguishable from the case; but, at all events, the court would not, in cases of doubt, deprive the defendant of the benefit of entering the suggestion, that the matter might be more fully discussed on the plaintiff's answer to the suggestion.

POLLOCK, C. B.—I am of opinion that this rule must be discharged. The question as to the dwelling within the jurisdiction was very properly given up by Mr. Hawkins. We can take judicial notice that Brompton is within the Middlesex County Court; if it be so, it should have been stated. The question is, whether a clerk is a person carrying on business? Business, as found in Johnson's Dictionary, may very probably comprehend anything which one has to do; but *carrying on* a business seems to imply something more. I think it means an independent business, not the occupation of a clerk who may be at any time dismissed.

ALDERSON, B.—I agree, also, that this rule ought to be discharged. The defendant does not carry on any business in a fixed place.

ROLFE, B.—Even if the business of the Privy Council be taken into consideration, business within the meaning of this act, I do not think that it

carries on a business. I do not know whether it has ever
 decided, but if not, I should be very much inclined to hold
 foreman in a haberdasher's shop carries on no business.
 no permanent independent occupation. He may be
 ed at any time.

r, B.—The occupation of a clerk is not a business, there-
 ink the rule must be discharged.

Rule discharged, with costs.

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 Affidavit—
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BAIL COURT.

(Before COLERIDGE, J.)

Easter Term, 1850.

NIND AND ANOTHER v. JONES.

Suggestion—Affidavit.

*avit for a rule to enter a suggestion, which throughout described
 'endant merely as "deponent:"*
t bad on that account.

*avit stated that "no officer of the said County Court was or
 erty to this action:"*

*be a sufficient negating of the exception in the act and state-
 that neither the plaintiff nor the defendant was at the time of
 mmencement of the action an officer of the County Court.*

N a former day, *Fish* had obtained a rule, on the part of
 he defendant, calling upon the plaintiffs to show cause why
 action should not be entered to deprive them of costs,
 t to the 9 & 10 Vict. c. 95, s. 128, the amount recovered
 nder 20*l*. He moved upon the following affidavit:

"In the Queen's Bench,

Between John Nind and Henry Nind, plaintiffs,
 and

William Jones, defendant.

liam Jones, of No. 13, Lower Belgrave-place, Pimlico, in
 erty of Middlesex, plumber, maketh oath, and saith that this
 as brought to recover the sum of eight pounds ten shillings,
 all sum for interest, due on a bill of exchange accepted by
 onent for twelve pounds. That the said bill was presented,
 t became due, at the house of this deponent in Lower
 e-place aforesaid, and that said bill was not then paid, and

H H

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deponent saith that this cause was tried before the sheriff of Middlesex, on a writ of trial, on Thursday, the eighteenth day of the present month of April, when the plaintiffs recovered a verdict for the sum of eight pounds eleven shillings and sixpence, and costs in the said cause. And this deponent further saith, that at the time of commencement of this suit he resided and dwelt, and does now reside and dwell, at No. 13, Lower Belgrave-place, Pimlico, in the county of Middlesex, and that the plaintiffs, at the time of commencement of this suit, dwelt and carried on their trade and business of wholesale paper-stainers within twenty miles of the residence of this deponent, that is to say, in Beech-street, Barking, in the city of London, as this deponent has been informed and verily believes. And this deponent further saith, that the plaintiff's cause of action arose at Pimlico, in the county of Middlesex, as aforesaid, within the jurisdiction of the Westminster County Court for Middlesex, held at No. 82, St. Martin's-lane, Westminster, in the said county, and not elsewhere; and that the residence of this deponent was, at the commencement of this suit, and still is, within the jurisdiction of the said County Court, and that no officer of the said County Court was or is a party to this action; and this deponent further saith, that, at the time of commencement of this suit, he was liable to be summoned by the said Westminster County Court for payment of the said sum recovered as aforesaid; and that, for the said cause of action, a writ of summons might have been entered against him by the plaintiffs in the said County Court. That the said Westminster County Court for Middlesex was, at the commencement of this suit, and still is, in St. Martin's-lane aforesaid, and is a court constituted under 9 & 10 Vict. c. 95, and that the judge before whom this action was tried, did not certify that the same was fit to be brought before the Superior Court."

Wood showed cause, and contended that the affidavit was insufficient, for that, first, it does not anywhere appear upon its face that the deponent is the defendant, and that it is inconsistent with the facts that the deponent may be a stranger to the action; also, secondly, that all the exceptions in sect. 128 are not sufficiently negatived, not only for not styling the deponent the defendant in the various particulars under that section, but also for not showing that *at the time of the commencement of the action* the parties were not officers of the court (*Meetan v. Nicholls*, 1 C. & Macrae, 123; *Dodd v. Wigley*, 1 Cox & Macrae, 213.)

Fish, in support of the rule, contended, first, that the affidavit sufficiently showed that by the word "deponent" the *defendant* was clearly meant and understood; and secondly, that the negativing of the exceptions in 128 was sufficiently explicit.

Cur. adv. v.

COLERIDGE, J.—In this case cause was shown against the suggestion for defects in the affidavit in two respects. First, it did not show in express terms that the party making it was the defendant in the suit; that it did not conclusively appear upon

erein stated and relied on that they related to the defendant. Certainly possible, consistently with all the allegations, that might be two persons of the name of William Jones, both to the same bill, and the action might be brought against the acceptor, the other being the drawer. It has been that the affidavit need not be so precisely framed as, if to prove conclusively all the circumstances to satisfy the section, but it must make a *prima facie* case: and the effect of the decision appears to me to be properly applicable. No one of ordinary sense could doubt that the plaintiff and defendant were the same person, and if he be not, the defendant gets the benefit of it. The second objection is, that it did not clearly appear that neither the plaintiff nor the defendant was, at the commencement of the suit, an officer of the County Court. *Wigley* (1 Cox & Macrac,) was cited, and I wished to look at the report, and it appears to me to be clearly distinguishable from the present case. If we read the allegation, that no officer was or was not, in relation to this action, with that which goes before it, it is clear that the latter allegation had reference to the commencement of the action.

The rule will, therefore, be made absolute.

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Suggestion—
Affidavit.*Rule absolute.*

BAIL COURT.

Easter Term, 1850.

(Before COLERIDGE, J.)

GOSLIN v. CONDER.

Suggestion.

It was brought in the Queen's Bench to recover a sum under 20l. The plaintiff took out a summons to try before the sheriff. This summons was opposed by the defendant, and the judge, with the consent of the defendant, made an order dismissing the summons, and ordering that in the event of the plaintiff obtaining a verdict, his costs should be paid upon the higher scale. At the trial the plaintiff obtained a verdict for 6l. 12s. The defendant then moved for leave to enter a suggestion to deprive the plaintiff of costs: but, after the proceedings at chambers, the defendant was not entitled to a suggestion.

It was a rule calling upon the plaintiff to show cause why a suggestion should not be entered to deprive the plaintiff of costs. It appeared that the action was brought to recover the sum

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of 6*l.* 12*s.*, and upon issue being joined, the plaintiff took out summons to show cause why the action should not be tried before the sheriff. Upon the parties going before the judge, the defendant objected to the cause being tried before the sheriff, upon ground that difficult points of law were likely to arise. Upon that an order was made dismissing the plaintiff's summons, but ordered by consent of the defendant, that if a verdict should be found for the plaintiff, the costs should be taxed upon the higher scale. The case then went down for trial, and the plaintiff obtained a verdict for 6*l.* 12*s.*

Lush now showed cause, and contended that as the defendant had consented, when before the judge at chambers, to pay out upon the higher scale in the event of a verdict being returned for the plaintiff, upon which undertaking the plaintiff had been directed to incur the expense of trying his action at the assizes, he could not now turn round and seek to deprive the plaintiff of his cost. In fact, the defendant had agreed to put the plaintiff in the same position as though his demand had been above 20*l.*, and the present application was a breach of faith.

O'Malley, Q. C., contra.—The terms of the 129th section of 9 & 10 Vict. c. 95, are imperative upon the subject, and the defendant might well be disinclined to have his cause tried before the under-sheriff, but would nevertheless be ready to have it tried before a judge of the County Court, and the defendant is entitled to enter a suggestion as of right.

COLERIDGE, J.—I think Mr. O'Malley has put this case upon the only ground on which it could be put; and if I thought the matter turned upon whether or not I had any discretion, and could I construe this clause so as to refuse the application, I should like to have taken time to consider the subject. But there is a primary objection which precludes this application; and I think the defendant has no right to come for this rule after what took place at chambers. There was an application made for an order to try the action before the sheriff. That application was opposed by the defendant. The judge says to him—If I refuse the order, will you in case of a verdict being returned for the plaintiff for less than 20*l.*, consent to the costs being taxed upon the higher scale? The defendant consents to this, and an order is made accordingly. Now, what is the meaning of that? Why, that if the plaintiff is put to the additional expense of taking his case to the assizes by the refusal of the defendant to consent to its being tried by the sheriff, the plaintiff, if he gets a verdict, shall not be a loser. Is that consistent with the present rule? It seems to me that it is inconsistent that the defendant is not entitled to what he now seeks.

Rule discharged.

BAIL COURT.

Easter Term, 1850.

(Before COLERIDGE, J.)

PRICE v. PRICE.

Recovery of Tenements—Certiorari—Title.

certiorari does not lie to remove a *plaint* entered, under sect. 122 of *County Courts Act*, for the recovery of a tenement. A question of title is not necessarily involved in a *plaint* for the recovery of tenement.

CERTIORARI having been obtained to remove from a County Court a *plaint*, under sect. 122 of the 9 & 10 Vict. for the recovery of possession of a tenement; *Price*, on a former day, obtained a rule *nisi*, to rescind the writ, or the *certiorari*, and to quash the writ.

Price showed cause, and contended, that although this *certiorari* might not issue under section 90, the *plaint* not being for any debt or damages, it might properly issue at common law as in any other case, the *certiorari* not being taken away; moreover, that the *plaint* did not raise a question of title.

Price, Q. C. (*Milward* with him), contended that the *certiorari* was improperly issued in this case. The County Court has an original jurisdiction in such a case, which the Court of Queen's Bench does not possess; therefore the *plaint* would be removed to no purpose, and, as, when brought up, this court could do nothing with it, the only result would be that the proceeding would be removed for ever. As regards the question of title, if that should ever arise, the County Court would know how to deal with it, and it is improperly entertained such a question, the proper remedy being by prohibition. He was stopped by

COLERIDGE, J.—It is not necessary to say that in no case under sect. 122 would a *certiorari* lie, because such a writ may go upon three grounds: first, to bring up proceedings to be disposed of in court; secondly, for defects; and, thirdly, because the proceedings are not within the section. But the first argument of *Price* is quite clear, and this court will not do that which it has no power to do; secondly, it is not suggested that there are any defects in the proceedings; and, thirdly, the question of title is not raised in such a case. I think, therefore, that the *certiorari* was issued improvidently.

Rule absolute.

BAIL COURT.

Easter Term, 1850.

HEATH v. LONG.

Jurisdiction—Cause of action—Material point.

A. who was a remote indorsee of a bill of exchange, sued B. the drawer, and recovered less than 20l. Upon a motion to enter a suggestion to deprive the plaintiff of costs :

Held, that the giving of notice of dishonour was a material point in the cause of action, and as the plaintiff and defendant lived within twenty miles of each other, the cause of action in a material point arose within the district, and the defendant was entitled to have a suggestion entered.

THIS was a rule calling upon the plaintiff to show cause why a suggestion should not be entered to deprive the plaintiff of costs, the debt recovered being under 20l. It was an action brought against the drawer of a bill of exchange by a remote indorsee. The parties lived within twenty miles of each other.

Lush showed cause, and contended that as there was no notice to show where the bill was indorsed to the plaintiff, it could not be taken to be within the provisions of sect. 128, which relates to concurrent jurisdiction, the indorsement being a material point in the case, and the intention of the act being only to impose a penalty of the loss of costs where the plaintiff knowingly brings his action in the Superior Court, instead of in the County Court.

Gray, contra, contended that, as notice of dishonour must be given by the plaintiff to the defendant, that would have been a material point, and would have informed the plaintiff of the defendant's residence, even supposing that, under the act, knowledge should be necessary, which he disputed.

COLERIDGE, J.—I should be extremely sorry to introduce a restriction contended for by Mr. Lush, inasmuch as vast inconvenience would arise in a great variety of cases, for it might be every case he said (if actual knowledge is necessary) that the plaintiff was ignorant of the limits of the County Court. Nothing of this kind is mentioned in the act, and it is enough that some material point arises within the jurisdiction of the County Court. Now, in this case there is clearly "some material point" in the cause of action occurring within the jurisdiction, and that the notice of dishonour, because, without such notice, the plaintiff could not have brought his action; and he must have known therefore, that, in a material point, the cause of action did arise within the jurisdiction of the County Court.

Rule absolute.

CATERER v. DEAN.(a)

Suggestion—Practice.

application to enter a suggestion to deprive the plaintiff of costs, defendant made an affidavit that the contract upon which the was brought was made in the district of the Windsor County

The plaintiff, in his affidavit, denied this, and stated facts in support of his assertion. There being no other testimony on either side, the court, upon these facts, refused the rule.

It was a rule calling upon the plaintiff to show cause why a suggestion should not be entered to deprive him of costs, amount recovered being within the jurisdiction of the Windsor County Court. The affidavit of the defendant in support of the rule, in general terms, that the contract upon which the case was brought was made within the County Court district. Thereafter, the affidavit of the plaintiff went into particulars, showing that the contract was not so made within the district.

The defendant showed cause, and contended that, as the facts upon which the rule was obtained were completely explained and admitted by the plaintiff, and as there was no third party to support the rule of the defendant, the rule should be discharged: (*Walker v. All, 1 Cox & Macrae, 275; Nolloth v. Crook, 19 L. J. 185.*) The plaintiff, contra, contended that as the facts between the parties were disputed, he was entitled to have the suggestion entered, and the question might be tried, it being sufficient on his part to establish a *prima facie* case: (*Hayter v. Fish, 1 Cox & Macrae, 197.*)

JUDGE, J.—I do not find any case where, upon a plea of *non est*, in a certain place being set up by one party and denied by the other, a suggestion has been allowed. According to the ordinary

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the case It is not a case where a third party proves anything. I have here merely the evidence of each of the parties in the action, and I think, therefore, that the rule must be discharged.
Rule discharged without costs.

BAIL COURT.

Easter Term, 1850.

(Before COLERIDGE, J.)

MILLS v. BEST.

Suggestion—Practice.

If, upon cause being shown against a rule to enter a suggestion to deprive the plaintiff of costs, the fact on which reliance is placed for the rule is in reasonable doubt, the suggestion will be granted. But it is otherwise where that fact is denied and satisfactorily explained, and the affirmation and denial come from the plaintiff and defendant alone.

The case of Caterer v. Dean (ante, p. 335), is not intended to apply to all cases of affirmative and negative allegations, but only where a fact was sworn to on one side in a general way, and denied and explained on the other side.

THIS was a rule to enter a suggestion under the County Court Act, the plaintiff having recovered less than 20*l*. The affidavit upon which the rule was obtained stated that the cause of action arose wholly at Brixton, in the county of Surrey, and within the jurisdiction of the Lambeth County Court. The affidavit, in answer, stated that the action was brought to recover the sum of 10*l*. lent to the defendant in Mitre-court Buildings, in the Temple. It further appeared that the plaintiff recovered a verdict upon the defendant's *I O U*.

Hayes showed cause, and contended that, as the plaintiff's affidavit fully answered that of the defendant, the suggestion ought to be refused, in accordance with the ruling of this court in *Caterer v. Dean* (ante, p. 335.)

Lush, contra, contended that it never could have been intended by the decision in the case cited, to deprive the defendant of his suggestion, merely because he had not incumbered his motion with the affidavits of third parties.

COLERIDGE, J.—The case decided by me yesterday, was what

BERIDGE, J.—I think so too, and therefore the rule should be absolute; but I do not wish, by this decision, to do away the effect of my decision yesterday.

Rule absolute.

COURT OF COMMON PLEAS.

Michaelmas Term, 1849.

READ v. BLAYNEY.

x—Setting aside judgment after suggestion to deprive plaintiff of costs.

trial, before the under-sheriff, plaintiff recovered 9l. 2s. 1d. only, and judge refused to stay proceedings to enable the defendant to apply a suggestion to deprive the plaintiff of costs; the plaintiff thereupon obtained judgment, and levied execution for damages and costs. Afterwards, defendant obtained leave to enter a suggestion, but did not at that time move to set aside the judgment. In a subsequent term the defendant moved to set aside the judgment and execution, and for the plaintiff to refund the money paid upon the execution: that defendant might do so.

[CE showed cause against a rule nisi calling on the plaintiff to show cause why the judgment and writ of fi. fa. issued

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and levy were before the 20th of June. In *Michaelmas* rule was obtained, and made absolute, to enter a suggestion to deprive the plaintiff of costs, but no motion was made to set aside the judgment.

It was contended that the application was too late, and that the rule to enter the suggestion ought to have provided for the setting aside of the judgment (*Vickers v. Mould*, 1 Cox & M 212; *Brooker v. Cooper*, *id.* 203), and that the plaintiff was entitled to sign judgment on the 8th of June (*Gill v. Russ*, 2 D. & L. 416), but had waited till the 11th, and that that the rule ought not to be made absolute.

Corrie, in support of the rule.—The plaintiff was informed that the trial that this application would be made, and he ought to have signed judgment and levied execution. The defendant applied for the rule to enter the suggestion within due time. The reason, therefore, why this rule should not be granted. In *J v. Beale* (5 M. & W. 276), the judgment was signed in vacation and it was held, that the defendant might apply to the court, at the following term, for leave to enter a suggestion on the roll for the purpose of obtaining costs under a Court of Requests Act, although no application was made to the sheriff for a certificate to stay judgment and execution, under the 3 & 4 Will. 4, c. 42. And in *King v. Earl* (5 Dowl. P. C. 595), the court allowed the suggestion to be entered after final judgment and execution, it appearing that the defendant could not apply sooner, and the judge at chambers had refused to stay proceedings.

WILDE, C. J.—We think that this rule must be made absolute. It appears that the defendant made his application to the court within the time allowed to apply to enter a suggestion to deprive the plaintiff of costs, that is to say, within four days after the trial of trial was returnable, and established his right to do so. The judgment must be set aside, for it was signed upon speculation. Though it is a regular judgment, the plaintiff signed it at the time of its turning out inefficient by reason of the application to set aside the suggestion, the intention to do which had previously been intimated.

Rule absolute.

Ex parte PURDAY.

*of commitment—Form of—9 & 10 Vict. c. 95. ss. 98, 99, 101—
Habeas corpus.*

*appeared by an order of commitment, in the form framed by
es under the 78th section of the County Courts Act, that the
it appeared to the summons, and that, upon his application, the
anted time, and postponed and adjourned making any order,
, at the said adjournment, the said defendant did not attend, or
y sufficient excuse for not attending, and did not produce any
, or allege any sufficient excuse for the nonproduction of such
, and that it then appeared to the said judge that the said
it had obtained credit from the plaintiff under false pretences,
made a gift, delivery, or transfer of his property, with intent to
his creditors; and that thereupon he did order the said
it to be committed, &c.*

*such order of commitment was good, that a fresh summons
e 98th and 99th sections was unnecessary, and that the case
thin the 101st section of the County Courts Act.*

*that the commitment, not being in the nature of a conviction,
to be construed with the same strictness, and was not bad for
he mode of committing the offence in the alternative.*

*L showed cause against a rule obtained by Parry, calling
on the judge of the Bloomsbury County Court of
: to show cause why a habeas corpus to discharge the
out of custody should not issue, on the ground of a
warrant of commitment. The warrant was in the
form:—*

*the Bloomsbury County Court of Middlesex, holden at
treet, Oxford-street, in the said county,*

—Archibald Cockburn plaintiff and John Purday defendant

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Practice.

the said defendant should forthwith pay to the said plaintiff the said sums of 20*l.* and 4*l.* 19*s.* so recovered against the said defendant.

"And whereas the said defendant, having *personally appeared to the said summons, and being present in court*, and having then neglected and refused to pay the said sums so recovered, was, upon the application of the said plaintiff, then and there examined, touching his estate and effects, and the manner and circumstances under which he contracted the said debt, which was the subject of the action, and which the said judgment was obtained against him, and as to the means and expectation he then had, and as to the property and means which he still had of discharging the said debt and costs, and as to the disposal he had made of any property.

"And whereas it appeared, upon such examination, to the judge of the said court, that the said defendant had obtained credit from the said plaintiff under false pretences, and had made *a gift, delivery, or transfer of property*, with intent to defraud his creditors; but the said defendant then requested to be allowed time to produce contrary evidence, and, upon his the said defendant's application, the judge of the said court granted time to the said defendant until the 18th day of January, 1849, and postponed and adjourned making any order adjudicating in respect of the said examination, until the said 18th day of January, 1849.

"And whereas a court was duly holden by the said judge, at the said Court-house in Berners-street aforesaid, on the said 18th day of January, 1849; and the said defendant did not attend at such court, or allege any sufficient excuse for not attending, and did not at such court produce any evidence or allege any sufficient reason for the nonproduction of such evidence.

"And whereas it then appeared to the satisfaction of the judge of the said court, that the said defendant had obtained credit from the said plaintiff under false pretences, and had made *a gift, delivery, or transfer of property*, with intent to defraud his creditors; and therefore the judge of the said court, by a certain order bearing date the 18th day of January, 1849, did order and adjudge the said defendant to be committed for the term of forty days to the Debtors' Prison at Whitecross-street, in the said county, &c.; or until he should be discharged by due course of law. These are, therefore, to require you the said high-bailiff, bailiffs, and others, to take the said defendant, and to deliver him to the governor of Whitecross-street aforesaid; and you, the said governor, are hereby required to receive the said defendant, and him safely to keep in the said prison for the term of forty days from the arrest under this warrant, or until he shall be sooner discharged by due course of law, for which the said shall be your sufficient warrant. Given under the seal of the court the 11th day of January, 1850.

J. WRIGHT,

(Seal.)

Clerk of the Court."

On obtaining this rule, it was contended that this warrant was bad, because it did not state that the defendant was summoned to appear in the County Court, and was present when the warrant

to be made, any gift, delivery, or transfer of any property. in the nature of a civil and not a criminal proceeding, and the strictness is not applied to orders as to indictments or informations. The statute treats the "gift, delivery, or transfer of property" as one act.

By (in support of the rule.)—It is uncertain whether these writs were under the 101st or 98th section; if under the 101st, the defendant should have been summoned. He contended that he did not appear by the order that the defendant was present at the judgment for payment was given, and that it clearly appeared that he was not when the order of committal was made; that the order did not state that the defendant was committed for a distinct offence. The forms were merely by way of direction to the judges of the County Courts, to insure uniformity, and it cannot be contended that they were empowered to make forms.

As to the common law rights of parties taking objection. The writ was in the nature of a punishment, and should therefore be preceded by a summons: (*Ex parte Kinning*, 1 Cox & Macrae,

The 98th and 99th sections of the County Courts Act give the judge power to commit if the defendant does not appear; there is no power of commitment in the absence of the defendant under the 101st section. The commitment was in the nature of a conviction, and ought to have stated distinctly whether the offence for which the defendant was committed was that he had made either a gift, a delivery, or a transfer of his property. An imputed charge in a conviction is bad. It was essential that the commitment should in every respect contain the necessary elements of a conviction: (*Rex v. North*, 6 Dowl. & R. 143; *Pain*, 7 Dowl. & R. 678; *Rex v. Middlehurst*, 1 Burr. 399.)

THE CHIEF JUSTICE.—I am of opinion that neither of the objections made by the defendant to this warrant has been sustained. The writ was appointed by the judges under the 98th section, which

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defendant did not appear. Under these circumstances the judge was justified in proceeding during the defendant's absence. The first objection, therefore, cannot be sustained. As to the second objection, the object of the proviso contained in the statute is to discover whether the party made any fraudulent disposition of his property, for the purpose of defeating the claims of his creditors. It might be impossible to ascertain whether property which has been withdrawn had been disposed of by gift, by delivery, or by transfer; the mode of removal is immaterial; the guilt is the fraudulent withdrawal. The argument that this order is like a conviction, and ought to be construed strictly, cannot be supported; the distinction between convictions and orders is well known, and has long been established. *Rex v. Middlehurst* (1 Burr. 399), was a case in which a party was fined for fraudulently removing goods to avoid a distress; the order was that he "removed or concealed goods," &c.; now removing and concealing are widely different, and the order was held good. In *Rex v. Lloyd* (2 Str. 996), the distinction between orders and convictions was again clearly established. It seems, therefore, that there is neither reason nor authority for making the rule absolute and discharging the defendant from custody. The rule must therefore be discharged with costs.

Rule discharged with costs.

Suggestion—Affidavit—Action of detinue.

*lavit in support of a rule for a suggestion to deprive the plaintiff
s, described the defendant as carrying on business at 42, Keppel-
Russell-square, and stated that the plaintiff, "at the time of
brought, resided in Euston-square, which is within one mile of
on-street, Gray's Inn road, the dwelling of the defendant."*
ufficient.

*whether detinue is an action of tort within the 129th section of
1 Vict. c. 95.*

INUE, tried before Maule, J., at the Sittings for Mid-
esex, in Easter Term. Verdict for the plaintiff, damages,

is case *Macnamara* had obtained a rule *nisi* to enter a
on on the record to deprive the plaintiff of costs.

as, *W. L.*, now showed cause, and contended that the
upon which the rule was obtained was defective, inasmuch
only stated that the sum recovered was under 20*l.*, when
I have stated that it was under 5*l.* Detinue is an action
and the 129th section of the 9 & 10 Vict. c. 95, deprives
ntiff of costs when the sum recovered in a Superior
n an action of *tort*, is less than 5*l.* Again, this affidavit
ive in another point. The defendant is described as car-
business at 42 Keppel-street, Russell-square, and it is
hat the plaintiff, "at the time of action brought, resided
on-square, which is within one mile of Harrison-street,
nn-road, the dwelling of the defendant." The affidavit
listinctly state that the defendant dwelt there at the time
on was brought. This affidavit neither negatives all the
ns contained in the 128th section of the County Courts
r does it state that, at the time of action brought, the

COURT OF EXCHEQUER.

Easter Term, 1850.

(Before ROLFE, B., sitting alone in the Exchequer Chamber.)

PARRY v. DAVIS et UXOR.

Suggestion.—Practice—Affidavit.

In moving to enter a suggestion to deprive the plaintiff of costs under the County Courts Act, husband and wife being defendants, the affidavit must state that both husband and wife were living within the jurisdiction of the County Court at the time when the action was brought.

Where the defendant, upon such application, states in his affidavit for which, if true, will oust the jurisdiction of the Superior Courts, the court will not inquire into the truth of the facts so stated and deal only by counter affidavits.

Whatever is necessary to be in the affidavit must be positively stated, and must not be left to conjecture.

GROVE had obtained a rule to enter a suggestion under the County Courts Act to deprive the plaintiff of costs.

Edwards showed cause.—This application was too late. It should have been made within the first four days of Term. The cause was tried on the 26th of March, and the rule was obtained until the 25th of April, ten days after the term commenced. [*Grove*.—The court kept it open in order to send to the Stamp Office to ascertain whether the stamp which was on a promissory note was correct, it having been much worn.] The next objection was, that this was an action against husband and wife for a debt due by the wife before marriage, and the affidavit merely stated that the husband was living within the jurisdiction at the time the action was brought; it should have stated distinctly that both husband and wife were at the time living within the jurisdiction; for, unless that were so, the plaintiff would be at liberty to sue in the Superior Court, and the defendant's case failed unless it was distinctly shown that the plaintiff was bound to sue in the County Court. Then, in the affidavit of the defendant it was sworn that all the causes of action arose within the jurisdiction. How could the defendant know that? The plaintiff's affidavit directly contradicted it. [ROLFE, B.—This court does not try these matters upon affidavits.] Then he must rest upon the fact that the affidavit of the defendant did not disclose that both husband and wife were residing within the district.

Grove replied.—The words of the act are singular, being appli-

affidavit. *Miller* (*amicus curiae*) stated the case of *Lewis v. [?]* (1 Cox, Mac. & H. 301.) There, an action had been brought by the father and son; the son died, a suggestion was entered of death and proceedings continued against the survivor. On application to enter a suggestion under the County Courts Act, Vict. c. 95, it was held that the affidavit was rightly made in the cause as against the survivor, but that it was defective in not showing that *neither* of the parties was an officer of the court at the time of commencement of the suit.] In this case the suggestion is that the wife was living with the husband, which the husband's affidavit should have negatived. He cited *Hayter v. Fish* (Mac. & H. 197.) Here the presumption is much stronger than in that case: (*Buller v. Coney*, 1 Cox, Mac. & H. 141.) *ROLFE*, J., in *Hayter v. Fish* there was a *prima facie* case. I do not see where there is here any presumption at all. It is clear that in that case the jurisdiction of the Superior Courts was ousted, if the facts were correct.] The husband and wife are, in contemplation of law, but one person.

J. E. B.—I am sorry that I cannot assist the defendant here. The defendant must be discharged. When the defendant states facts which, if true, will oust the jurisdiction of the Superior Courts, the court will allow the suggestion and will not try the facts upon the merits; (a) but it is a different thing where the affidavit is short and does not state the facts. The question here is, is the affidavit sufficient? I think not, under sect. 60. When the affidavit states that the defendant did dwell within a certain district, it shows jurisdiction according to sect. 128. The word "defendant," according to the interpretation clause, where there are two, means both defendants; the affidavit does not state that both defendants were here. It is probable they did, but we must not leave to conjecture what might have been positively stated.

COURT OF COMMON PLEAS.

MICHAELMAS TERM, 1849.

November 26.

SLATER v. MACKAY.

*Costs of action on judgment—Original debt under 20l.—False
nul tiel record—9 & 10 Vict. c. 95, s. 129; 43 Geo. 3, c. 46,*

*An action was brought in a superior court for 15l. 3s. 6d., and the
defendant allowed judgment to go by default. The plaintiff then sued
for judgment for the debt and costs (exceeding in all 20l.) for the
obtaining execution against the defendant's person. To this
there was a false plea of nul tiel record.*

*Held, that in such a case the court will exercise its discretion as
Geo. 3, c. 46, in favour of the plaintiff.*

*Held also, that the 129th section of 9 & 10 Vict. c. 95, does not
apply to cases of judgment by default.*

IN this case an action had been brought in one of the S
Courts for 15l. 3s. 6d., and the defendant had allowed
judgment to go by default. The defendant was a clerk in a
office, and had no effects which could be taken under a
The plaintiff therefore sued upon the judgment for the de
costs (which exceeded 20l.) in order that he might have ex
against the defendant's person. To that action there was
plea of nul tiel record.

A rule *nisi* having been obtained under the statute 43
c. 46, s. 4, (a) calling on the defendant to show cause why
he should not pay the costs of the last mentioned action,

H. Mills showed cause.—The defendant, in his affidavit,
that the original debt was contracted within the jurisdiction
Hammersmith County Court of Middlesex; that he was li
be sued there; and that no question of law could have a
the case had been tried there. That, therefore, was the c
which the plaintiff should have brought his action; the pla
only entitled to the costs of the first action in consequence
defendant's allowing judgment to go by default; had he de
the action the plaintiff would have been deprived of his costs
the 129th section of the County Courts Act. Then, without
costs the claim would not have been for 20l., and, therefo

(a) The 43 Geo. 3, c. 46, sect. 4, enacts that, in all actions which shall be brought in any court in England or Ireland, from and after the 1st day of June, in the year of our Lord, 1798, in which judgment recovered, or which shall be recovered, in any court in England or Ireland, by the plaintiff or plaintiffs, in such action on the judgment, shall not recover, or be entitled to the costs of suit, unless the court in which such action on the judgment shall be brought, shall otherwise order.

upheld, it will be holding out an inducement to defendants plaintiffs to unnecessary expense. [MAULE, J.—The words do not appear to me to be clear, and to refer only to cases in which a verdict has been given. The case cited shows how strong an opinion must have been entertained by the majority of this court to have induced them to deliver judgment contrary to the opinion given by my brother Cresswell.] The plaintiff, who has only sued in a Superior Court, when he might have done so in County Court, is certainly entitled to no consideration on this point; pleading a false plea of *nul tiel record* is not in itself sufficient to entitle the plaintiff to the costs: (*Hanmer v. White*, 13 M. & W. 519; *Hall v. Pierce*, 5 Dowl. 603.) The cases of *Freeman v. Freeman* (13 M. & W. 372); and *Mason and Nicholls v. Nicholls* (13 M. & W. 118), decide, that notwithstanding the 7 & 8 Vict. Act, a defendant may be taken in execution in an action on a judgment recovered, although the debt recovered in the former action was under 20l.; and in the judgment in the latter case it is said that the creditor clearly had a right, notwithstanding the act, to bring an action on the judgment in the former action; taking his costs, and losing his costs of the second action, which the court were bound to give him as the practice of giving."

in support, was not called upon. MAULE, C. J.—The statute says, that in actions on judgments, the plaintiff shall not recover, or be entitled to, any costs of suit, unless the court, or a judge, shall otherwise order. The facts of this case show that the plaintiff sued the defendant for a debt, and the defendant suffered judgment to go by default, thereby neglecting the justice of the claim. The plaintiff swears that the defendant is a clerk in a public office; that he had lost over his effects and was living in furnished lodgings, and that the writ of *fi. fa.* upon the judgment would be unproductive.

COURT OF QUEEN'S BENCH.

February 26, 1850.

THOMPSON v. INGHAM.

Jurisdiction—Pleading—Title to land—Prohibition.

It is the duty of the judge of the County Court, in the first instance, to determine whether the title to land is in question so as to come under the 58th section of 8 & 9 Vict. c. 95, but if he decide improperly, the Superior Court will issue a prohibition.

THIS was a general demurrer to a plea. The facts and circumstances sufficiently appear in the judgment.

Martin (for the plaintiff,) cited *Lilley v. Harvey* (Cox, & H. 115); *Rex v. Milnrow* (5 M. & S. 248); *Rex v. Wren* (1 B. & Adol. 648.)

Watson (for the defendant,) cited *Fearon v. Norvall* (Cox, & H. 174); *Reg. v. Bolton* (1 Q. B. 66); *Owen v. Pierce* (Mac. & H. 115); *Ex parte Rayner* (5 D. & L. 342); *Robin Lenaghan* (Cox, Mac. & H. 97); *Brittain v. Kinnaird* (1 B. 432); *Mould v. Williams* (2 Q. B. 469); *Reg. v. Higgin* (Q. B. 149, n.); *Reg. v. Dodson* (9 A. & E. 704); *Thompson v. Hudson* (14 M. & W. 353; Bracton, p. 108.)

JUDGMENT.

PATTESON, J.—This was a declaration in prohibition. It is that, on the 2nd of June, 1847, one J. Batty prosecuted in the County Court of Westmoreland, at Kirkby Lonsdale, in the county, before the defendant, then being the judge of the court, a certain plaint theretofore commenced by a certain sum in an action of contract, issued out of the said court for an alleged debt or claim of 4*l.*, for the alleged use and occupation by the plaintiff of a certain field of the said J. Batty, in the township of Kirkby Lonsdale, in the said county, and in which said action said J. Batty was the plaintiff, and the now plaintiff was the defendant. That the now plaintiff appeared in the said court before the now defendant, and protested and insisted to the effect thereof that the said court ought not to have, or take, and have cognizance of the said action, for that in the said action the title to the said field was in question, and that, in fact, the title to the said field was in question in the said action, and that the now plaintiff then insisted that the said field was the soil and freehold of the now plaintiff before and at and during all the time of the alleged occupation of the same by the now plaintiff; and that J. Batty then alleged and insisted that the said field was, and

time aforesaid, the soil and freehold of him the said J. nevertheless the said court and the said judge thereof to take and have cognizance of the said action, and pro- o entertain, and try, and determine, and did, in fact, take ice of the same, and tried the said cause; and after divers nents thereof, gave judgment therein in favour of the in the said action, &c. That the now defendant was still ng in the said action, and therefore the plaintiff prayed rit of prohibition might issue to prohibit the said court, said judge thereof, and the said J. Batty, from further ngs in the said action, and from carrying into execution judgment. To this the defendant pleaded—That when plaintiff so appeared and protested that the title to the l was in question in the said action, the said J. Batty, at e time, appeared and protested that the title to the said not in question in the said action, and then required the endant, as such judge as aforesaid, to hear and determine action; that the now defendant having heard and consi- l the evidence, allegations, and arguments which the now produced in support of the protest and position that the he said field was in question in the said action, and all the , &c., produced by the said J. Batty on the other side, and adjudged that the title to the said land was not in in the said action, and therefore entertained, tried, heard, rmined the said cause, and gave judgment therein as in the Judgment. aration mentioned. But on the hearing of the said cause, he said J. Batty nor the now plaintiff produced, made, or evidence, allegation, or argument other than those which judge so heard and considered. is plea the plaintiff demurred, and there was a joinder in r.

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plea, being in confession and avoidance, is to be taken to e statement in the declaration, that, in fact, the title was ion, it is clearly bad; for then the judge had no jurisdis- under 9 & 10 Vict. c. 95, s. 58, and his thinking and that he had would not give it him. But, assuming that does not admit that statement, but rather denies that it ermitted to be made, by reason of the decision of a com- court that the title was not in question, the point will be that decision is conclusive. The law on this subject, so gards the analogous case of magistrates' convictions, was cussed in *Reg. v. Bolton*, and it was then held, that when ge is such as, if true, is within the magistrates' jurisdiction, ng of the facts afterwards by the magistrate is conclusive; n the charge is not such as, if true, would be within the te's jurisdiction, no finding of facts can alter it. The pre- is between those so put. The judge had clearly jurisdic- *md facie* to try a plaint for use and occupation. The , if there were any in the County Court, would not show title is in question; the point, whether it is or not, must

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of necessity arise upon the evidence, and as soon as it appears it is, the jurisdiction of the County Court ceases, the judge of necessity determines that point for the time, because it depends whether he hears it on the merits. Is, then, this determination conclusive? We think that it is not. The objection is analogous to a plea to the jurisdiction in other courts, which is indeed determined in the first instance by the court in which it is pleaded, but is subject to a writ of error;—the County Court Act gives no writ of error or appeal of any sort, but then it is presumed that the court deals only with matters within its jurisdiction. If a doubt arises as to that question, we think it impossible to pretend that any of the provisions of the act make the solution of the doubt by the court itself final. If so, the question must be taken to one of the Superior Courts on motion for a prohibition or writ of *habeas corpus*, and if that court, as in the present case, directs the party should declare, then the question becomes one of evidence. In either view of the plea, therefore, we are of opinion that the judgment must be for the plaintiff.

Judgment for the plaintiff.

COURT OF COMMON BENCH.

April 30, 1850.

KIMPTON v. WILLEY.

Prohibition—Set-off—Splitting demands—9 & 10 Vict. c. 95, ss. 1 & 2.—Particulars of demand.

The plaintiff sued out two complaints in a County Court. The particulars of the first exceeded 20l. for work and labour and goods sold and delivered, and purported to give credit for a set-off, showing a balance due under 20l. The particulars of the second complaint were items for lent and interest, not exceeding in the whole 20l. Some of the items in the two complaints were contemporaneous, but there were no items in any other way connected. Both complaints were heard, and the plaintiff recovered certain amounts in respect thereof. The affidavits in support of a motion for writs of prohibition, on the grounds that the first complaint had been reduced below 20l. by a set-off, and that the two complaints constituted but one entire cause of action, showed that these objections were raised at the hearing, and that there had never been any agreement stated in which it had been agreed that the set-off should be allowed, but did not show that the plaintiff, at the hearing of the first complaint, proceeded more than 20l. to be due, or that there had not been an arrangement between the parties to allow the set-off.

*that the affidavits were defective upon these grounds; that the
 ge might inquire if the defendant had consented to the reduction of
 claim, and that such consent need not appear on the particulars of
 and.*

*also, that the particulars of the two complaints did not form one cause
 action within 9 & 10 Vict. c. 95, s. 63, and that this was not a case
 plitting demands.*

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Prohibition—
 Set-off—
 Splitting
 demands.

SH, on a former day, had obtained a rule *nisi* for writs of
 prohibition to the judge of the County Court of Hertford-
 to restrain further proceedings in two complaints issued out of
 court.

The following were the particulars attached to the complaints. To
 first complaint:—

	£	s.	d.
25. Journey to Baron Dimsdale to pay rent on your account.....	2	2	0
Chaise hire and expenses	0	10	6
To taking inventory of your furniture, farming stock, effects, &c.....	5	5	0
Writing, copying, stationery, &c.	0	10	6
14. Two quarters oats	2	14	6
7. Four quarters best white oats.....	4	8	0
Five bushels spring tares	1	7	6
14. One quarter oats	1	3	0
12. Journey to Cothall to see S. as to your claim upon him	2	2	0
Chaise hire and expenses	0	10	6
1846, 1847, 1848, 1849. To very many attendances on you, Baron Dimsdale, and Mr. Mallam, &c. &c.	6	6	0
Railway hire and expenses.....	0	16	6
	£27	16	0
14. Creditor by balance of Mr. Pinnock's account	8	5	3
	19	10	9
Commission for collecting the above account	0	8	0
Paid for receipt stamp.....	0	0	3
	£19	19	0

Particulars of the second complaint:—

20. Cash.....	10	0	0
7. Cash.....	5	0	0
14. Do.	2	0	0
	17	0	0
Interest on the above	2	0	8
	£19	0	8

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Both complaints were heard on the 20th March, 1850.

Upon the hearing of the first complaint, the attorney for the defendant objected that the court had no jurisdiction, because it appeared on the face of the complaint that the demand exceeded the value of the goods, and that the plaintiff could not reduce the demand below that value by setting off the sum of 8*l.* 5*s.* 3*d.* received by the plaintiff in account of the defendant, from Pinnock, without the consent of the defendant. The County Court judge overruled the objection and gave judgment to the plaintiff for 17*l.* 9*s.* debt, and for costs.

On the second complaint being called on, the attorney for the defendant objected because the subject-matter of this and the preceding complaint constituted together the plaintiff's demand against the defendant, which exceeded in all, 39*l.*; that the items of the two complaints were one demand or one cause of action; and that the plaintiff ought not to be allowed to divide or split such demand or cause of action into two sums of less than 20*l.* each.

This objection was overruled, the cause was heard, and judgment given for the plaintiff—17*l.* debt, and 4*l.* 8*s.* costs.

The defendant, in his affidavit, stated that he had never received any account with the said plaintiff, or acknowledged that any sum was due from him to the said plaintiff in respect of the matter of the plaintiff's claim, and that he had not, nor had any person on his behalf, at any time, knowledge and belief, had any person on his behalf, at any time, authorized or consented to the plaintiff's setting off the said sum of 8*l.* 5*s.* 3*d.*

Hawkins now showed cause.—Judgment having been given up in the County Court, and execution levied on the defendant's goods, the office of the judge is at an end, and the application is too late: (*Re Poe*, 5 B. & Ad. 681.) There is no instance of prohibition after execution. [WILLIAMS, J.—In 2 Inst. 100, it is said that the King's Court may award prohibitions as well as judgment and execution as before. The Court of Queen's Bench held that prohibition lies after judgment in the case of *Ex parte Bishop of Exeter* (19 L. J. 279, Q. B.)] Here the money remains in the hands of the officer for want of buyers. The plaintiff must apply to the court for a *venditioni exponas*. The rules of the County Courts state that the money received is to be brought into court, and that the plaintiff is to go to receive it: (*Robinson v. Lenaghan*, 1 Cox, Mac. & Hertslet, 79, and the authorities there cited.)] On the merits this rule is discharged. As to splitting the demands, *Grimbley v. Macrae* (1 Cox, Macrae & Hertslet, 79,) does not decide that, because a number of items might be recovered in one action, therefore they are the proper subject of one demand. The Brighton County Requests Act enacts, that it shall not be lawful to divide a cause of action into two or more suits for the purpose of bringing them all within the jurisdiction of the court; and it was held that a plaintiff, after having recovered 15*l.* for the price of goods in the County Court, might sue for goods sold and delivered

in the Superior Courts, although these latter demands at the same time as that for the price of the horse: (*Neale*, 1 D. & L. 163; *Wickham v. Lee*, 1 Cox, Macrae & Hertslet, 119.) There is nothing to show that the different items in the two complaints were in any way connected with one another. *Arnold* (1 Cox, Macrae & Hertslet, 320,) shows the course of proceedings to be adopted in the County Court. The County Court is not to be ousted of its jurisdiction by the mere assertion of the defendant that the claim is part of a larger demand constituting one cause of action only. The judge must inquire, at least, into the existence of a larger demand, and it is his province to say whether or not the whole constitutes one cause of action. The objection was taken too late; it should have been made when the plaintiff was called on. The plaintiff having recovered on the first count, where, except in the County Court, could he recover on the second count claimed in the second? Then, as to the set-off, *Woodward v. Newman* (1 Cox, Macrae & Hertslet, 231), and *Beswick v. Beswick* (1 Cox, Macrae & Hertslet, 243), are distinguishable. And the facts of the case are consistent with the supposition that there was an arrangement at the hearing in the County Court to allow the set-off, if there was no such arrangement, that should have been

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in support of the rule.—This application is not too late; nothing has yet to be done, which may be prohibited. The plaintiff has to make his return to the writ of execution, and the defendant has to appear to receive the proceeds of the levy. Affidavits in *Beswick v. Capper* did not negative the supposition of any consent at the hearing to allow the set-off, and yet this court granted prohibitions; nor did they state what took place at the hearing. In *Thompson v. Ingham* (reported *ante*, p. 348), it is held that the decision of the judge of the County Court, as to whether he has jurisdiction or not, is not conclusive. As to the splitting of the demands, by a comparison of the two complaints, it can be seen that the parties intended that there should be one cause of action. This is a running account between them, and some items in each complaint accrued on the same day. This is within the rule in *Aykroyd v. Aykroyd*, and the test applied by Erle, J., in *Wickham v. Wickham* (a)

JUDGMENT.

ERLE, C. J.—Though the discussion of this case has run to a considerable length, the court being anxious to see that they were doing nothing counter to any of the previous decisions, yet, on going at the whole of the case, we are of opinion that, in the result, there will not be any great difficulty. The motion is for a writ of prohibition, on the ground that it is shown to us that the County Court is proceeding in a matter over which it had not jurisdiction.

In the judgment in that case, *ante*, p. 121, Erle, J., said, "If they must have had two counts they may have two complaints. That I gather from the judgment of the Court of Exchequer, referring to *Grimbley v. Aykroyd*.—REF.

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With respect to the first plaint, let us see how the case presented to the court. The affidavit upon which the rule is stated that two separate plaints were entered in the County between these parties, one of such plaints being for the sum of 19*l.* 19*s.* on an account amounting to 27*l.* 16*s.* for goods and delivered, and work and labour; and the other plaint for the recovery of 19*l.* 0*s.* 8*d.* for money lent and advance two sums together make a sum exceeding that over which the court had jurisdiction; and it says that both the plaints were heard on a certain day, and that the deponent, from instructions received from the defendant, attended at the hearing, and that the first case was called on, objected to the hearing, on the ground that the judge had no jurisdiction over the case, for that he appeared upon the face of the plaint that the demand of the plaintiff amounted to more than 20*l.*; and he contended that the plaintiff had no right to set-off, as it appeared he had done so on the face of the particulars, the sum of 8*l.* 5*s.* 3*d.*, for the purpose of reducing the debt to a sum of less than 20*l.*; and he contended that, no account having been settled and stated between the plaintiff and the defendant, the debt or claim was more than 20*l.*, and that therefore the judge of the County Court had no jurisdiction. He says the judge overruled the objection, heard the plaint, and made an order on the defendant for payment of 17*l.* 9*s.* for debt, and 5*l.* 1*s.* for costs; and then when the other case was called on, that he objected to the hearing of that case because the plaintiff claimed in the whole 39*l.* and that was one demand, or one cause of action, and therefore the court could not be allowed to split such demand into two; and he contended that the whole demand was but one cause of action, and that cause was also heard, and an order made for the payment of the sum claimed. Now, the affidavit of the plaintiff does no more than state that he instructed his attorney to defend, and that he never did adjust any account in which he allowed a set-off. Those are the facts in the affidavits. We find then that this is a case in which the County Court has given judgment for the plaintiff for the sum of 17*l.* 9*s.* and the question is, was that debt made out and proved? Of that there is no question. Has he proved more than 17*l.* 9*s.*? Of that there is no question. Has he reduced by any set-off. Of that there is no question. It states, simply, that a certain plaint was issued, and that certain things appeared; that an objection was made, that the cause was heard; and, in the result, judgment was given for the plaintiff for 17*l.* 9*s.*, not that it was part of a larger demand which was reduced by a set-off, or that any more than 17*l.* 9*s.* was proved. Beyond all doubt, it is the duty of those who move for a prohibition to lay proper grounds before the court, and to come to the conclusion that the County Court has exceeded its jurisdiction. How can that be said to appear when the whole result of the proceedings, as far as the actual proceedings of the court are concerned, is, that an objection is made to the hearing, and that, in objection it was the duty of the court to attend to. It is

intiff might have had evidence to sustain his case; if he had, could he have sustained the case in the first instance? Why, owing a debt of 28*l.* and an agreement in the presence of the that 8*l.* should be taken in reduction, and that there was a due. That might have been proved in the most satisfactory manner, by showing that the defendant had delivered an in writing, in which he had given the plaintiff credit for reduction of the 8*l.*, and leaving a balance to the amount d. How can the judge tell whether it was or was not so, has heard the case? It stands thus—there was a plaintiff particular demand, in which the plaintiff claimed only for the sum of 19*l.* some odd shillings; that is within the act, the court had jurisdiction over it; then judgment is given at amount without it being shown that the court, in giving judgment, had in any way, or in any respect, exceeded its jurisdiction. So far as the judgment itself imports, it is within the action, and the only objection presented on the face of the it is an objection the court was bound to overrule. Therefore, exactly out of the case of *Beswick v. Capper*, for in *Beswick v. Capper*, a prohibition was granted. It there appeared that the ff had been allowed to prove a demand of more than 200*l.*, set-off had been allowed of 180*l.*, reducing the demand to and then, of the demand so reduced by actual allowance of t-off of 180*l.*, against the debt of upwards of 200*l.*, of that the plaintiff proposed to strike off 20*l.*, so making it within jurisdiction of the court. It therefore affirmatively appeared Judgment. t case, that the court had gone into matter out of the jurisdiction of the court, and had allowed a set-off, adversely to the to the amount of 180*l.* On the present occasion there is the fact to show that, in the course of the hearing, the court ot keep itself strictly within its jurisdiction. Therefore it rs, with respect to the first case, there is no ground at all for application. With respect to the second case, which stands in rent position, it being a demand of 19*l.* 0*s.* 8*d.*, an entire claimed to be due for money lent, the objection is that emand was presented as a separate and distinct demand, in truth only part of a larger demand, and being at the time hearing only a portion of the larger demand which exceeded amount the court was entitled to go into. Now, suppose a ition goes for that second sum—what is the effect of the ition? It is that the plaintiff is to sue in the Superior where the debt he seeks to recover is 19*l.* 0*s.* 8*d.* That is the jurisdiction of the County Court. Why is he to be ated going there to enforce his demand? The mode in which y be done is distinctly pointed out by the statute. When ause comes to a hearing, then, at that time, if he proves a d beyond 20*l.*, he must be nonsuited; or, it may be, he may ough I go to prove 100*l.*, I am content, at the time, to take ad give up 80*l.*; if that is done, it is to be recorded and it is shown by the judgment, for the statute expressly says that a

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note or memorandum is to be taken of it when it is given a judgment is to state on the face that the party has abandoned the excess. The court has jurisdiction to hear a demand of amount, provided the plaintiff consents to give up so much to bring the sum claimed within the jurisdiction. It is clear the demand in this plaint was the only demand which existed, had recovered a judgment in that very court, and all that was due to him beyond that was the 19*l.* 0*s.* 8*d.*; that was the only sum he could have recovered if he had brought an action in the Superior Courts. But, independent of that, the demand is for money lent. We are told it must be considered as part of the larger demand—and why? The demand is for work and labour, for certain services, and for goods sold and delivered; and it is said these two demands must be considered as forming one entire demand. Why? Has any case ever been delivered in which the plaintiff put together the demands in the form of one? Have the parties ever treated them as one demand? Of that there is no evidence. Are the sums lent connected with the sums claimed in the other plaint? The question is this, whether you can say, in the absence of all evidence to the contrary, that the parties have ever treated these sums as forming one demand; in the absence of all circumstances which can be shown to show that they ever intended that they should constitute one demand. We know there is a demand for money lent; we know there is a demand for work and labour; but there are no circumstances to show that they were ever intended to be treated as one account. Therefore, the rule must be refused.

MAULE, J.—I am of the same opinion with the Lord Justice, who has so fully gone into the reasons for the judgment that I will not repeat them. With respect to the case of *Thompson v. Ingham*, that was a declaration in prohibition, where the question was, that a question of title was in issue, and the answer to that allegation in the plea was, that the judge had considered and decided that the question of title was not in issue, on declaration to this plea, the court gave judgment for the plaintiff. In the case of *Thompson v. Ingham*, the judge decided, and what the record in that case showed was, that the judge had decided a question of title, but he is expressly prohibited to decide, but was of opinion for himself that he was not so deciding, because such a question was not involved in the decision of the court. The record before the Court of Queen's Bench conclusively showed that the question of title was in issue there. Now, here there is nothing to show us that a question with respect to a larger sum than 20*l.* was in issue. It appears to me, in all probability from the state of the facts, that it was not in issue. If it appeared that such a question had been in issue, and that the court had decided upon the contrary question of whether there did exist a larger amount than 20*l.*, then, supposing the court had no jurisdiction to enter in such a question, this would be the same as that case, supposing you were to hold that in no case could the court inquire into a debt of

0*l.*; but that although it may turn out upon proof trial, that the claim is a claim for more than 20*l.*, the plaintiff has a right to more than 20*l.*, and that splitting it, yet he has the option of having the judgment against him, or being nonsuited, or of recovering 20*l.* only and doing the residue. Therefore such is the difference with to the jurisdiction of the courts, those who entertain cases more than 20*l.*, in which there is an implied prohibition, which from the enabling clauses, the 58th and 63rd; and the proper clause, with respect to matters of title. I think, therefore case is distinguishable on those two grounds. In *Thompson*, it appeared there was an inquiry into matter over which the court had no jurisdiction; here, the matter is sent to the jury and it does not appear to have been inquired into. It is clear that the court had no jurisdiction there, and that it had jurisdiction here. On all the grounds urged the application has failed.

LAMBS, J.—I am of opinion that a prohibition ought not to issue in this case, unless it clearly appears that the court has acted without jurisdiction. The onus of showing that the application is founded on a supposed division of the cause of action, is on the applicant; with respect to the application, so far as it is founded on a supposed division of the cause of action, it is for me to say that I am not at all satisfied that the subject of two claims constituted “one cause of action,” in any legal construction of that expression in the act of Parliament.

With respect to so much as refers to the set-off, it is explicitly by the applicant that the sum claimed is a sum of 20*l.*; and a premature objection was made, which was overruled.

FOURD, J.—I am entirely of the same opinion. With respect to the main question, namely, whether the two demands constituted one entire claim, the case is essentially different from *Wiley v. Aykroyd*. There is nothing to connect the various demands together, nothing in them of a common character, except that they may be recovered in the same declaration in the same cause of action; whereas in *Grimbley v. Aykroyd* the defendant was on the business of a shopkeeper, where he was in the habit of paying his workmen, and there was one entire system of dealing; at all events, there was a demand arising out of one set of things, which does not appear in the present case; therefore, that case does not decide this. On these grounds the application is refused.

Rule discharged, with costs.

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EXCHEQUER CHAMBER.

May 8, 1850.

LLOYD v. GREGORY.

Costs—Suggestion—London Small Debts Act—Affidavit.

In moving to enter a suggestion to deprive the plaintiff of costs under City of London Small Debts Act, it is sufficient to state in the affidavit that "neither the plaintiff nor the defendant was at the time," &c., officer of the said court." It is not necessary to state that no person party to the suit, was at the time, &c., an officer, &c. It is sufficient to negative that plaintiff or defendant was, at the time, an attorney of either of the Superior Courts.

GRAY had obtained a rule calling upon the plaintiff to show cause why the defendant should not be at liberty to enter a suggestion on the roll to deprive the plaintiff of costs under London Small Debts Act, 10 & 11 Vict. c. 71.

Miller showed cause.—This rule had been applied for too late, as the application was made before a prior rule which had been obtained was disposed of. The suggestion was not entered in terms of the affidavit upon which the permission had been obtained. The facts which the plaintiff was bound to negative in his affidavit were not sufficiently negated. [ROLFE, B.—The question was whether there is an affidavit which warrants the suggestion.] This was a motion under the City of London Small Debts Act, 10 & 11 Vict. c. lxxi., s. 112, corresponding with sect. 128 of County Courts Act. It must be negated that an officer of the City of London Small Debts Court was a party to the act (*Dodd v. Wigley*, 1 Cox, Macrae & Hertslet, 213.) All that was necessary here to have done was to have followed the words of the statute; but they say in the affidavit that "neither the defendant, nor the plaintiff, nor either of them, was at the time of the commencement of this suit officers, or an officer, of the court held for the recovery of small debts and demands in the County of London." It was quite consistent with this that an officer of that court might have been a party to the suit, although he was not either the plaintiff or the defendant upon the record. Another objection turned upon the meaning of the words used by the plaintiff. If he were an attorney of the Superior Courts he would be at liberty to bring his action here and to negative that fact. They say, "that neither the defendant nor the plaintiff, nor either of them, was at the time of the commencement of this suit an attorney of either of the Superior Courts:" the word "*either*" applies to two; one of the parties, therefore, might still be an officer.

one of the three courts, but not of the other two. If a rule were drawn up, and a suggestion entered according to the terms of the affidavit, it would be open to a demurrer, and the court would not put the party to the expense of a demurrer, and therefore would not sanction the entry of a suggestion on the roll.

Gray was not heard in reply.

ROLFE, B.—Here the usual words are employed, and we must not scan them too strictly. I think them sufficient, though not perhaps strictly correct. In *Dodd v. Wigley* the affidavit did not negative that the party was an officer of the court at the time of the commencement of the suit; that case does not apply. That the application was too early is not an argument, because it was after the court had given leave to renew the application.

Rule absolute; judgment, if any, to be set aside.

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June 1, 1850.

STILT v. BOOTH.

Jurisdiction—Discharge by Insolvent Court—Prohibition from the Petty Bag Office.

Writ of prohibition, issued ex parte out of the Petty Bag Office and setting forth no grounds for prohibiting the proceedings, is void, and will be set aside on motion.

USH had obtained a rule *nisi* calling upon the defendant herein to show cause why the writ of prohibition issued by the defendant out of the Petty Bag Office of the Court of Chancery should not be set aside. The writ in question was in the following

term:—

“Victoria, by the Grace of God of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith. To the judge of the Southwark County Court of Surrey, greeting. Whereas, by the Common Council of England, it is provided that it is not lawful for any one in England, but for us and our ministers having special authority so to do, to attack any person using through their bailiwick or power, to answer another upon any contracts, covenants or trespasses, done without the same

STILT & BOOTH. bailiwick or power. We, therefore, do prohibit you the said judge of the said County Court, and also you, the clerk and high bailiffs and others the officers of the said County Court, and each and every of you, from proceeding or carrying into execution, or in anywise giving effect to or proceeding upon the judgment where William Grimwood Stilt is the plaintiff, and Robert Booth the defendant, and therein fail not at your peril. Witness myself, Westminster, the twenty-sixth day of February, in the thirteenth year of our Reign."

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*Jurisdiction—
Practice—
Insolvent.*

It appeared that, a plaint having been entered by the plaintiff against the defendant in the Southwark County Court for the recovery of a debt, a certain sum was found to be due, and the defendant ordered to pay it by instalments. The defendant afterwards applied to the Insolvent Debtors' Court for his discharge and inserted this debt in his schedule, and was discharged accordingly. Subsequently to this, one of the instalments became due and was unpaid, and he was thereupon summoned to appear in the County Court pursuant to sect. 98 of the 9 & 10 Vict. c. 95, to show cause why he should not pay, or be committed to prison. The defendant appeared accordingly, and urged that his discharge by the Insolvent Court was a sufficient answer to the application. The judge, however, thought his jurisdiction was not ousted by that proceeding, and he accordingly made an order for payment of the money on a day named, or, in default thereof, the defendant was to be committed to prison. Before that day arrived, the defendant obtained the above-mentioned writ from the Petty Bag Office of the Court of Chancery, and, on the day of payment arriving, he served it on the judge of the County Court, who regarded it and committed the defendant for default of payment. Upon an application subsequently made to Coleridge, J., chambers, a *habeas corpus* was granted, and the defendant was discharged.

Skinner showed cause.—This writ has issued regularly in accordance with the practice of the Petty Bag Office, there being no new rules applicable to it, except that 10s. shall be paid upon its issuing.

WIGHTMAN, J.—Upon what ground practically is this motion made, as the defendant has been discharged out of custody?

Lush.—The defendant has brought two actions against the judge in respect of this imprisonment, and at the trial reliance may be placed by the defendant upon this writ, which it is necessary therefore, as being illegal, to get rid of. It issued without the leave of the Court of Chancery on an *ex parte* application. The County Court has jurisdiction to deal with it by sect. 39 of the 12 & 13 Vict. c. 109. Before such a writ can issue, there ought to be an order for it. Every prohibition must contain upon its face the ground for its issuing; it must show a proceeding in an inferior court, and that such court is exceeding its jurisdiction, and the ground for the interference of the Superior Court. We have a right now to come and show that it is a bad writ. In *Baddie*

Denton (Cox, Macrae & Hertslet), a writ of prohibition out of the Petty Bag Office was set aside.

WIGHTMAN, J.—And in that case the writ stated some ground for its issuing.

Skinner.—This is an old writ, issued from a proper office in the usual form.

WIGHTMAN, J.—That does not appear to be so, for in the case in the Exchequer the form was different, and even there it was set aside.

Skinner.—The writ is well issued out of the Court of Chancery.

WIGHTMAN, J.—It is not shown that it is, and upon its face it appears to be quite irregular, according to all the rules; it is certainly bad, according to the law applicable to writs of prohibition.

Lush.—There is another ground. The judge of the County Court did not exceed his jurisdiction. The defendant set up his discharge by the Insolvent Court as an answer to the claim. The judge had jurisdiction to decide upon that question; and, even supposing his decision were unsound, he still had jurisdiction, and prohibition would not go. If this were otherwise, there would be an appeal from the County Court upon every decision upon a point of law.

Skinner.—The question was decided in the defendant's favour by his discharge by Mr. Justice Coleridge.

WIGHTMAN, J.—My brother Coleridge did not thereby decide that the County Court judge had no jurisdiction; but as he had a power himself to discharge the defendant from custody, he would exercise that power under the circumstances.

Skinner.—The case of *Ex parte Purday* (19 L.J. 144, Q. B.) is authority.

WIGHTMAN, J.—It seems to me that I ought to make this rule absolute upon both grounds, for it is not shown to me that such a writ as this can be in accordance with the proper practice of any court; and that this is not the invariable form is proved by the different form of the writ, as shown in the case in the Exchequer. There appears to have been no want of jurisdiction in the judge of the County Court, for although the defendant was discharged by my brother Coleridge, that might merely have been to have protected his person, and not upon the ground that there was no jurisdiction in the County Court judge to commit him. I decide, however, principally on the ground that such a writ as this cannot be issued.

Rule discharged, without costs.

1850.
Jurisdiction—
Practice—
Insolvent.

COURT OF QUEEN'S BENCH.

June 12, 1850.

SWAIN v. COX.

*County Court—Prohibition from the Petty Bag Office.**A prohibition issued out of the Petty Bag Office, which upon its appears to be regular, and contains a good ground for prohibition not be set aside, though issued ex parte.*

THIS was a rule calling upon the defendant to show cause the prohibition issued herein from the Petty Bag Office should not be set aside, or why a *supersedeas* should not issue. The writ of prohibition was in the following form:—

“Victoria, by the grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, the judge of the County Court of Berkshire, held at Reading to the clerks of the said court, and to the High Bailiff of the same court, greeting. Whereas pleas or actions in which the title to any corporeal hereditaments is in question cannot be impleaded or brought or adjudicated upon, in the County Court; and whereas David Swain hath impleaded Thomas Cox in an action in tort, in the County Court of Berkshire, held at Reading, in the county aforesaid, to a certain plea or action wherein the title to a certain hereditament is in question (that is to say), the title to a certain cottage situate at the Chapel-hill, Tilehurst—common to the parish of Tilehurst, in the county of Berks; we do therewith prohibit you, the said judge of the said County Court, and you, the said clerks and High Bailiff, and other the officers of the said County Court, and each and every of you, from carrying into execution, or in anywise giving effect to or proceeding upon any judgment in the said action in your said County Court, which David Swain is plaintiff, and Thomas Cox is defendant. They shall fail not at your peril. Witness ourself at Westminster, the 12th day of April, in the thirteenth year of our reign.”

Phipson showed cause, and argued that, as the writ of prohibition was good upon its face, and issued properly out of the Petty Bag Office, this court would not set it aside. He then went to the facts to show that this action did concern a title to land.

Prentice, contra, contended that the writ ought not to be issued *ex parte*. [WIGHTMAN, J.—I cannot take judicial notice of the practice of issuing writs of prohibition out of the County Court Chancery. The writ appears to be good upon its face. In a case in this court (*Stile v. Booth*, 1 Cox & Macrae, 359), the writ was obviously bad on its face. The real question is, did title

tion?] *Prentice* then argued, that from the judge of the SWAIN v. Cox.
 Court having decided that the title did not come in ques- 1850.
 was to be inferred that it did not.

HTMAN, J.—It certainly seems to me that the title is in *Prohibition*
 1, and the better way will perhaps be to declare in prohi- *from Petty Bag*
Office.

s ultimately agreed that an action of trespass should be
 in one of the Superior Courts to try the right.

Rule accordingly.

COURT OF QUEEN'S BENCH.

June 6, 1850.

ROBERTSON AND ANOTHER v. WOMACK.

County Court—Certiorari.

*Is "by leave of a judge," mean by leave of a judge at chambers.
 plication, therefore, under sect. 90 of the 9 & 10 Vict. c. 95, for
 rari to remove a plaint from a County Court, must be made
 chambers.*

WER moved for a *certiorari* to remove into this court a
 aint entered in the County Court of Yarmouth.

TMAN, J. — Should not this application be made at
 s?

r.—Sect. 90 of the 9 & 10 Vict. c. 95, says, "by leave of
 of one of the said Superior Courts;" so that it would
 er would do.

TMAN, J.—No; that means a *judge at chambers*—it does
 "by leave of the court." You must apply to a judge at
 1. *Writ refused.*

COURT OF QUEEN'S BENCH.

June 12, 1850.

BUGG v. SCOTT.

*Suggestion—When it may be applied for (a)—Setting aside judgment.
Costs.*

An action of tort was tried at the Spring Assizes, on the 1st of April, 1850, in which the plaintiff recovered 3l. damages. On the 25th of April he entered judgment. On the 6th of June the plaintiff gave notice of taxing his costs, and proceeded to sign final judgment, and execution for the damages and costs. On the 10th of the same month the defendant moved for a rule to set aside the judgment, and leave to enter a suggestion to deprive the plaintiff of costs:

Held, that he was in time, but that as the defendant by lying by, in not signing judgment, the plaintiff to sign judgment, the defendant must pay the costs of entering judgment and subsequent proceedings.

IN this case an action of trespass had been tried at the last Assizes for Essex, when a verdict was found for the plaintiff with 3l. damages. On the 25th April he entered judgment in his master's book, leaving a blank for costs. Nothing further was done by either party, until the 6th of June, inst., when the plaintiff gave the defendant notice of taxation, and he proceeded to sign judgment to tax his costs, and enter up final judgment. Judgment was signed for 3l. damages and 93l. 12s. costs, and execution issued. On Monday the 10th, *Power* obtained a rule calling on the plaintiff to show cause "why the judgment signed herein and execution (if any) should not be set aside, and why the plaintiff should not forthwith bring into court the record in this cause (the record already brought in), and carry in the roll and the defendant's liberty to enter a suggestion thereon to deprive the plaintiff of costs of this action; the verdict found for the said plaintiff for a sum for the recovery of which a plaintiff might have entered in a County Court, pursuant to the statute in that behalf made and provided, and that, in the meantime proceedings should be stayed."

Lush now showed cause, and contended that, as the defendant had allowed the whole of Easter Term to elapse, and did not move until the 10th of June, he was too late, particularly as the costs had been taxed; that the plaintiff had an absolute right to his costs unless deprived of them by the proper course, and that a suggestion was not a proper course.

(a) As to the time within which an application for a suggestion should be made, see *Reichart v. Lambert*, *post*.

ITMAN, J.—They say that you knew that you were not Bugg v. Scott.
to judgment for your costs, and therefore that it was
sary to come to the court. 1850.

—We are entitled to them unless the other side come for
tion.

ITMAN, J.—The suggestion is merely the process of the
is the act of Parliament which disentitles you to the

*Time of
applying for
suggestion—
Costs.*

—But the defendant, nevertheless, should come for that
promptly: (*Smith v. Temperley*, 16 M. & W.) The appli-
t seems, should be made within the four first days of

, in support, was not called on.

ITMAN, J.—It seems to me that the words of the statute
rong that the defendant might well have believed that the
would have taken no steps to recover the costs; I do
efore, think he is precluded from making this motion,
rly as it appears that after he was served with notice of
he lost no time in coming to the court. However, I
he chooses to lie by until the plaintiff takes another step
case, he ought to be let in only on payment of the costs
been put to, but not of this application.

Rule absolute.

COURT OF QUEEN'S BENCH.

May 8 and 23, 1850.

JOSEPH v. HENRY.

Jurisdiction—Balance of account—Prohibition—Merits.

An action was brought in the County Court for the balance due on some bills of exchange, the full amount of which would exceed 20l. At the trial, the defendant contended that the judge had no jurisdiction inasmuch as the plaintiff had no right, under the circumstances, to treat his claim as a balance; the judge, however, thought that he had, and gave judgment for the plaintiff. Upon a rule for a prohibition,

Held, that as the question of jurisdiction involved the whole merits of the case, it being, in fact, whether there was a balance or not; and as the judge clearly had power to enter into the facts which raised the question, and as the affidavits were conflicting, this court would not interfere with the judgment of the judge of the County Court.

This court will not review the decision of a judge of the County Court even upon a question of jurisdiction, where it is possible that the judge may have come to a right conclusion.

IN this case a rule nisi for a prohibition had been obtained to restrain the judge of the County Court of Surrey from proceeding any further in this action. The action was brought to recover a balance due upon some bills of exchange; and at trial the defendant contended that the plaintiff had no right to treat his claim as a balance, but that the proper claim upon the bills was over 20l. and, therefore, that the judge had no jurisdiction. The judge, upon hearing the parties, thought that the plaintiff had, under the circumstances, a right to bring his action as for a balance, and proceeded to adjudicate. The facts of the case were very peculiar and involved, and the affidavits were exceedingly contradictory.

Lush showed cause.—In this case the plaintiff claimed 4l. balance of a larger sum, and to decide it, the judge had power to go into the different items of the account; he clearly had jurisdiction. *Woodhams v. Newman* (1 Cox, Macrae & Hertslet, 231), *Beswick v. Capper* (ib. 243), show that where there is anything equivalent to a payment, so as to reduce the amount below 20l., the County Courts have jurisdiction.

Jones, contra, cited *Thompson v. Ingham* (1 Cox, Macrae & Hertslet) to show that the decision of the judge as to what is and what is not within his jurisdiction, is not conclusive. The cases cited on the other side show that assent is necessary to the appropriation of

in part satisfaction of the demand; here no such assent
 en given by the defendant.

Cur. adv. vult.

JOSEPH
 v.
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 1850.

JUDGMENT.

ERIDGE, J.—This was a rule for a prohibition to the
 of the Surrey County Court, under circumstances which,
 as I can collect them, appear to be as follow:—One Van
 gen, the father-in-law of the plaintiff, sold watches and
 ry to the defendant. After the sale, and which, as the
 f alleges, was for cash, the defendant, who was a travelling
 r, left home, and during his absence, as he says, but which
 ed, Van Millengen called at his house and obtained three
 nces from his wife. On the defendant's side it is said that
 eptances were given without his authority, which, however,
 ed, and it is sworn, on his side, that, by threats, Van Mil-
 afterwards obtained the delivery of watches, and some
 rticles, and he certainly gave a receipt for them in these
 "Received of Mrs. Henry three watches, which I am to
 until Mr. Henry comes to town." The plaintiff says he
 ted these bills, and the defendant was sued in the Palace
 but the case was removed into this court. In the year
 he defendant's attorney demanded of Van Millengen the
 ry of the goods, but nothing was said to repudiate the
 nces. In September, 1849, the plaintiff says the watches
 ds had been handed to him by Van Millengen as a collateral
 r, and he threatened to send them to Messrs. Debenham
 . In September, the plaintiff says they were left at his
 s security, and he threatened to proceed for any balance
 ght be due upon the bills. In pursuance of this the plaintiff
 his plaint to recover 4*l.* 14*s.* on the balance of account.
 he trial the sale of the articles for 18*l.* was proved, and the
 f obtained judgment for the balance upon the bills, although
 endant protested against the jurisdiction. The judge pro-
 stating that he treated the giving the watches as part
 it. It is difficult to understand how the judge could arrive
 conclusion. The judge has arrived at a conclusion upon
 we understand him as stating that he considered the defen-
 have acted in such a way as to give him jurisdiction. The
 n, it is said, is whether if this court thinks a judge of the
 Court has drawn a wrong conclusion, it can review such
 ion, and prohibit the judge from proceeding; but this
 n, even supposing the affidavits to be free from contradiction,
 ave this circumstance, that the decision of the merits turns
 dential point on which the question of jurisdiction arises.
 intiff claims a sum under 20*l.* the balance remaining due
 bills of exchange, together amounting to 23*l.*; he cannot
 unless he proves the sum due is a balance, and if he proves
 e judge has jurisdiction. The question whether this court
 iew the decision on the merits of a case does not arise.
 ge had power to inquire into the facts, and if he had found

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Balance of
account.

Judgment.

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HENRY.
—
1850.
—
*Jurisdiction—
Balance of
account.*

it was not a balance, it would have been wrong in him to proceed further, and probably he would not have done so. When the record sets forth facts in which it is proved that the judge decided wrong, prohibition will lie, but in this case there are conflicting affidavits, and it is possible that from the defendant's evidence the judge may have been right. If I made this absolute, I should establish a precedent for reviewing the decision of the judge of the County Court; I think, therefore, that the rule should be discharged.

Rule discharged, without costs.

COURT OF QUEEN'S BENCH.

June 1, 1850.

REG. (on the relation of WILLIAMS) v. OWEN.

*Removal of Clerk of County Court—Quo Warranto Information
Inability—Insolvency—9 & 10 Vict. c. 95, s. 24.*

Mere insolvency does not constitute the "inability" mentioned in section 24, of stat. 9 & 10 Vict. c. 95, as a ground for the dismissal of a clerk from a County Court.

The decision of the judge of a County Court, approved by the Chancellor, with respect to the inability or misbehaviour of a clerk, under sect. 24, of stat. 9 & 10 Vict. c. 95, is not conclusive, but the clerk has a right to have that decision reviewed by this court on a writ of habeas corpus in proceedings upon a quo warranto.

THIS was a special verdict upon certain issues of fact raised upon the pleas to a return to a *quo warranto* information. The information was against the defendant for usurping the office of clerk of the County Court of Merionethshire. The relator alleged that after the division of the county into districts, &c. the judge of the County Court, Arthur James Johnes, appointed Williams (the relator) to be clerk for each court in each district; and that before the appointment of the defendant, Johnes revoked the appointment of Williams for inability, appointed the defendant in his place, and that the Lord Chancellor approved and confirmed both the revocation and the new appointment. The pleas upon which issues were raised, were—1st, that the relator had not been removed on account or by reason

inability within the meaning of the 9 & 10 Vict. c. 95; *REG. v. OWEN.*
 at before and at the time of his removal he was under no
 , but able to perform the duties of his office; 3rdly, that
 l Chancellor did not approve, &c., in manner and form, *1850.*
 ie cause was tried at the Spring Assizes of 1849, before *Removal of clerk*
 J., at Merioneth, when a special verdict was found for *—Inability.*
 ion of this court. The special verdict set out a long
 ndence between the parties, and found, as a fact, “that
 s was removed from each and every office, &c., by Johnes,
 unt and by reason of inability for and in the said office,
 such inability, on account of, and by reason of which the
 liams was removed, was very great pecuniary embarrass-
 d want of money to pay his debts existing before and at
 of the removal of the said Williams, and that no other
 existed before or at the time of such removal or dismissal;
 t he had not been imprisoned for debt, or physically dis-
 om performing the duties of the said office; that such
 and dismissal had been approved by the Lord Chancellor;
 relator had no notice of any kind, nor had he been called
 answer, nor had he been heard before his dismissal; and
 set out the appointment of the defendant as clerk.” The
 was raised upon this special verdict whether there should
 nent for the relator or for the defendant?

Jervis (with him *Welsby*) for the relator.—The main
 depends upon stat. 9 & 10 Vict. c. 95, s. 24 (a), by which
 e of the County Court is empowered to remove the clerk
 ourt “in case of inability or misbehaviour, subject to the
 of the Lord Chancellor.” Sect. 27 shows the duties of
 k when appointed, and by sect. 36 the clerk is compellable
 security for the due performance of his duties, and for
 ounting. The clerks, therefore, have a certain tenure of
 They hold during “ability and good behaviour;” and the
 here is, what constitutes “inability?” It would include,
 e, mental incapacity, imprisonment, or any other physical
 power to do the duties, but it does not extend to unfitness
 nduct, which may, in some cases, come under “misbe-
 ” but never under “inability.” Mere poverty is no inability.
 e word is used in sect. 26, where it evidently refers only
 ne illness or unavoidable absence. The clerk has sufficient
 if he be mentally capable, and physically be not obstructed.
 , in the Municipal Corporations Act, 5 & 6 Will. 4, c. 76,
 incapable of acting” means precisely the same thing as
 ,” and yet cannot include pecuniary embarrassment, because
 rovided for by sect. 52. There is no analogy here to a
 isitatorial power, and it cannot be said that the approval
 hancellor cures every objection.

Kelly (with him *Cowling* and *Baxter*) for the defendant.—
 l be extremely injurious to the public if it should be held

(a) See the amendment of this clause by 13 & 14 Vict. c. 61, s. 4.

REG. v. OWEN. that the Lord Chancellor's decision can in every case be reviewed by this court or by a jury. The statute gives the power to the judge in the first instance, and the Lord Chancellor in the last, to dismiss for inability, and the court cannot by a *quo warrant* impeach their decision. *Reg. v. The Governors of Darlington Free Grammar School*, 6 Q. B., 682. [LORD CAMPBELL, C. J.—It is not in the nature of an appeal to the Lord Chancellor, because the dismissal cannot take place without his approval. In point of law what difference can it make that the judge has power to dismiss, subject to the approval of the Lord Chancellor? With reference to this case, would not the law be the same if the statute had given the judge power to dismiss, in the same terms, except that the approval of the Lord Chancellor was not mentioned? The word "inability" must not be limited to physical incapacity. The Municipal Corporations Act, which has been cited, shows that the Legislature considered bankruptcy, insolvency, and the like as disqualifications for office. "Inability" is an incomplete term; it means "inability to perform the duties of the office," in other words, incompetency. Without physical incapacity or moral misconduct, a clerk might be found unable to keep accounts or transact properly the business of his situation. He would then be removable for "inability." Embarrassments are almost certain to distract his attention, occupy his time, and make him an inefficient public servant. Besides, he will be constantly exposed to pressure and temptation, with the suitors' money passing through his hands, and even, if not actually dishonest, may induce that sort of suspicion which is most mischievous as attached to officers of justice. Further, it is unjust to the persons who are his sureties to hold that a clerk, actually insolvent, may still be retained in office.]

The Attorney-General replied.

LORD CAMPBELL, C. J.—We must look to the facts which the jury have found in this case. The facts found also must be the foundation of our judgment. If the jury had found that there was any "inability" upon the part of the relator, I should have said that the decision of the judge of the County Court was final, having been approved by the Lord Chancellor. That approval, however, is simply a condition under which the judge's power of removal exists. The judge's power to remove, then, is in case of "inability," and it must be seen that such inability existed. Now, the jury find that there was ability, for they find that the relator discharged the duties of his office until he was removed, and that, though the judge dismissed him for inability, his only inability was great pecuniary embarrassment, and want of money to pay his debts, which did not affect his mind, or hinder him from the discharge of his official duties. If, hereafter, this state of pecuniary embarrassment should affect his mind, or hinder him from performing his duties, there may be, either upon the score of inability or of misbehaviour, a ground for dismissing him. Great pecuniary difficulty may exist with great official ability; for

now that when William Pitt, the younger, was making his entry the admiration of the whole world, he was under the pressure of those great pecuniary obligations which were afterwards charged by the grateful country which paid his debts.

REG. & OWEN.

1850.

Removal of clerk
—Inability.

ERLE, J. (a)—I am of the same opinion. The judge of a County Court may discharge the clerk in case of inability; but the clerk has a right to raise the question whether that inability exists, and the question is for a jury to decide. That question has been referred to a jury, and they find that, though the relator was released for inability, no other inability except insolvency could be charged upon him. That seems to me the full effect of the finding. So that there is no actual mental or bodily inability, but circumstances are found to exist which make it probable that the clerk might be affected, harassed, and distracted by them, or that his principles of common honesty might be endangered. But these circumstances are merely evidence. The fact of insolvency does not, as a conclusion of law, import the "inability" mentioned in the statute. There may be, and often is, a state of helpless insolvency, without any fault of the individual, and befalling him in a course of ordinary prudence, and the most complete necessity.

Judgment for the Crown.

COURT OF COMMON BENCH.

June 12, 1850.

CARTER v. TREHEARNE.

Suggestion—Insufficient affidavit—Material point.

affidavit to obtain a rule to enter a suggestion stated "that the cause of action therein arose in a material point within the jurisdiction of the Westminster County Court of Middlesex; and that on the hearing of the cause the defendant had made certain admissions."

And, bad, the statement as to the "material point" being construed as referring to the admissions of the defendant on the hearing.

BROWN showed cause against a rule nisi to enter a suggestion to deprive the plaintiff of his costs. The action was sought to recover the sum of 11*l.* 15*s.*; and it was referred to a master to say how the verdict should be entered, who adjudged that, after giving credit for certain sums set off, the plaintiff was

(a) Patterson and Coleridge, JJ. were sitting to hear the Crown Cases Reserved.

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Affidavit—
Material point.

entitled to recover 14*s*. The affidavit on which the rule was obtained stated "that the cause of action therein arose in a material point within the jurisdiction of the Westminster County Court of Middlesex; and that, on the hearing of the cause before the barrister, the defendant made certain admissions." It was now contended that what the defendant called a "material point" was, in fact, the admission stated to have been made on the hearing, which, although a piece of evidence, was made after action brought; and that, indeed, the whole cause of action arose in Surrey.

E. James, in support.—It is not necessary that the defendant should do more than bring himself within the language of the act of Parliament. The court will not decide these conflicting questions on affidavits, but will grant the suggestion: (*Nolloth v. Croal*, 19 L. J. 185, Q. B.) That was a motion similar to the present. There were counter affidavits as to whether the defendant resided within twenty miles of the plaintiff; and Erle, J., in delivering judgment, said, "It is quite clear that this court will not decide the disputed question, as to distance, on affidavits. The suggestion must be permitted to be entered, and the plaintiff may, if he please, raise the question of fact by a traverse to the suggestion." The case of *Butler v. Coney* (1 Cox, Macrae & Hertslet, 141), is much in point.

WILDE, C. J.—The sole question in this case is, what is the meaning of the expression "material point," as used in this affidavit, and could a party be indicted for perjury if the statement was untrue? I think that, if he were, he would have an answer referring to the subsequent statement. The affidavit on which this rule was granted is insufficient, and I am willing to decide on the affidavit alone, the defendant, undoubtedly, meaning to refer to the evidence, viz., the admission, and not to any other point.

Rule discharged, with costs.

COURT OF EXCHEQUER.

*Hilary Term.**January 26, 1850.*

(Before ROLFE, B.)

EDWARDS v. ROGERS.

Certiorari—Prohibition—Second plaint—Costs.

An action having been brought in the County Court demanding 20l. for damages done to certain premises by lime kilns of the defendant, the plaint was removed by certiorari, on the ground that inasmuch as the value of the lime kilns would be destroyed if the plaintiff were to obtain a verdict, and that they were worth more than 20l., the cause was not within the jurisdiction of the County Court. A second plaint was then brought demanding 5l. for the same injury, but stating it to have accrued between a longer period of time. At the hearing the defendant pleaded in abatement that the former suit was pending, but the judge proceeded to hear the cause. On motion for a prohibition, it was held, that a prohibition would not lie to restrain the judge from proceeding with the second action.

In this case a rule for a prohibition had been obtained by Bagley, directed to the judge of the County Court of Montgomeryshire, upon the following facts:—The plaintiff had brought an action in the County Court against the defendant, to recover 20l. damages for an injury alleged to be done to his fields by the fumes of certain lime kilns belonging to the defendant, from November 10, 1843, to October 30, 1849. A certiorari was granted by this court, on an affidavit that the lime kilns were worth more than 20l., and would be rendered valueless if the plaintiff were to obtain a verdict. Thereupon the plaint was removed into this court, and no further proceedings were taken thereon. On November 30 the present action was brought in the County Court against the defendant by the plaintiff, demanding 5l. for injury done by the same lime kilns, from November 10, 1843, to November 30, 1849. At the hearing the defendant pleaded in abatement that the former suit was pending, and the judge made note of the objection, but ordered the cause to proceed. It was, however, adjourned, and now a prohibition was moved to stay further proceedings in it.

Unthank now showed cause.—The 90th section of 9 & 10 Vict. c. 95, enacts, that “no plaint entered in any court holden under this act shall be removed or removable into any of Her Majesty’s superior Courts of Record, by any writ or process, unless the

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—
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debt or damage claimed shall exceed 5*l*. A *certiorari*, theret could not issue in this case. But a prohibition is only an indir attempt to obtain the same objects. The only ground on whic Superior Court will grant a prohibition is that the inferior cou trespassing beyond its jurisdiction. The pendency of the for plaint does not affect this one; a plaintiff is not bound to follo defendant into a Superior Court when the defendant has remo the cause thither: (*Norrish v. Richards*, 3 A. & E. 733.) wou the plea of pendency be good in the County Court, even if it were, the plea of *lis pendens* is not good as to part only of the cause of action: (*Hill v. White and Williams*, 6 B N.C. 26.) The plaintiff is willing not to proceed in the first act

Hake in support of the rule.—Whatever the form of the act the real question at issue is, the whole value of the lime-kilns, if the plaintiff succeeds there will be a fresh cause of action aga the defendant every day they continue to be used. Practically right to use the lime-kilns at all is at issue—this will be tried the judge of an Inferior Court, although the same question been already carried for decision before this court. The claimed differs, but the cause of action is the same, and plaintiff is, in fact, dividing his cause of action, and bringing : plaints upon it, which, by sect. 63, he is forbidden to do. words of that section against splitting the cause of action in the cause of one action: (*Grimbley v. Aykroyd*, 1 Cox, *Macra Hertslet*, 79.) [ROLFE, B.—This is not a “splitting” of a ca of action. The meaning of that expression is, that if one has cause of action for A., B., and C., he shall not have a separ action for each. Here the plaintiff proceeds for his whole caus action in the first plaint. Your real objection is, that having proceeded for A., B., and C., he now proceeds for A., B., C. & D.] Yes, and so would recover damages twice over.

ROLFE, B.—I do not think I have any discretion in this ca I may have a discretion where I have jurisdiction to prohibit, not where I have no jurisdiction. I will look at the affidavits.

Cur: adv. vult

On a subsequent day,

ROLFE, B.—I have considered this case, and I am satisfied t the court has no jurisdiction to grant a prohibition. The stat expressly enacts, that where the cause of action is less than 5*l* shall not be removed, and I cannot presume that the Judge of County Court will not do justice and decide correctly. Bu shall make it a condition that the plaintiff shall not proceed w the plaint which has been removed into this court.

Rule discharged, with costs, plaintiff undertaking not to proceed with the first suit.

(a) In that case, to a count for work and labour done, the defendants pleaded that the was done for them jointly with others. The plaintiff proved that work to the amount was done for the defendants, and to the amount of 36*l*. 5*s*. for defendants jointly with o It was held that the plea was no answer to the action.

ss—Commitment under 8 & 9 Vict. c. 127—Pleading.

for trespass and false imprisonment, the defendant justified (& 9 Vict. c. 127) by process from the Sheriff's Court of London. His plea showed that a judgment had been in an inferior court against the plaintiff by one W. T.; that is against the plaintiff for not having paid the sum so reasonably served on him; that he appeared, and thereupon there was an order upon him for payment of the debt by instalments, afterwards, and before the said time when, &c., the judge, finding that an instalment was unpaid, made an order that the defendant should be imprisoned forty days; and afterwards the judge, at the request of the defendant, then being the attorney of and for the said plaintiff, and according to the form of the statute, issued his warrant of commitment of the plaintiff, upon which he was taken and kept, &c.

that the said order was not made *modo et formâ*.

the defendant, in order to sustain his plea, produced an order of commitment, which corresponded with that described in the plea, but did not recital of a previous summons calling on the plaintiff to show cause why he should not be committed to prison. The learned judge at the trial directed the jury to find a verdict for the defendant, and they found accordingly.

half of the plaintiff having been obtained, calling upon the defendant to show cause why there should not be a new trial on the ground of misdirection, or why judgment should not be entered for the plaintiff notwithstanding the verdict:

the order of commitment was invalid, because it did not show that the defendant had been served with a previous summons to show cause why he had made default in payment of the instalment had been served on the plaintiff; and therefore the replication traversing the order raised an issue which the defendant had not supported, because the order was bad, the judge directed the jury to find for the plaintiff, and the rule was absolute for a new trial.

- KINNING v. W. 50; *Williams v. Jones*, 13 M. & W. 628; *Fisher v.* 11 East, 82; *Dresser v. Stansfield*, 14 M. & W. 822; BUCHANAN. Saunders, 157 c.; *Marshalsea Case*, 10 Reps. 76; *Webb v. 1* 1 Ventris, 273; *Painter v. Liverpool Gas Company*, 11 433; *Green v. Elgie*, 5 Q. B. 114; *Sedley v. Arboin*, 5 E 433; *Cooper v. Harding*, 7 Q. B. 928; *Barker v. Braham and* 3 Wils. 308, and in 2 Wm. Blackstone, 866; *Adams v.* Sayer's Reports, 82; *Pitney v. Foxall*, Willes, 690. plaintiff, and in support of the rule, there were cited—*Co* "Estoppel," E. 4; 1 Chitt. Pl. 259; *Dudley v. Whatmore*, 39; *Lucas v. Knockill*, 10 Bing. 157; *Ransford v. Copelan* E. 482; *Re Gray*, 2 D. & L. 539; *Reg. v. Hawkins* (Settlement and Removal), 97; 5 Burn's Justice, 287; *Venables*, Strange, 630; *Reg. v. Rhodes*, 3 Dowl. 289; *Tordoft*, 5 Q. B. 533; 1 Wms. Saunders, 198; *Startup* *donald*, 2 M. & Gr. 395, and (in error) 6 M. & Gr. 593; *Clement*, 3 Brod. & Bing. 297, and in 7 Moore, 200; *Holland*, 1 M. & Gr. 644; *Codrington v. Lloyd*, 8 A. & *Williams v. Germaine*, 7 Barn. & Cr. 468; *Sandon v.* 7 Barn. & Cr. 800; *Evered v. Pattison*, 2 Marsh, 304.

Cur. ad

JUDGMENT.

June 25.

Judgment.

WILDE, C. J., now delivered judgment.—This was an trespass and false imprisonment. The defendant pleaded, guilty; and, on issue joined thereon, the jury found for tiff. The defendant also pleaded a plea stating judgment recovered against the plaintiff by one William Townle Inferior Court of Record—that is, the Sheriff's Court of of London—for a debt under 20*l.*, and a subsequent ap under the statute 8 & 9 Vict. c. 127, in that court, for a against the now plaintiff, touching the not having paid the costs recovered by the said judgment, and alleged that be granting of the summons requiring the appearance of the n tiff, a summons was duly served, and the now plaintiff acc appeared before the judge of the said court, and that the ju made an order that the plaintiff should pay the debt and certain specified instalments. The plea then avers that the made default in the payment of the first instalment (2*l.*) w became due and payable, although payment of the same v demanded of him; and afterwards, and before the said tin &c., to wit, on the 4th day of January, 1847, the said in remaining wholly in arrear and unpaid, it was duly made to and was proved, and did then and there appear to the sa &c. that the plaintiff had notice of the said order, and tha been served with a copy thereof, and the original showr and that he had not paid the said instalment, and that t had been duly demanded of him, and was in arrear and whereupon the said judge duly and according to the form

statute ordered that the plaintiff should be committed for 7 days, &c.; and thereupon the judge of the said court, at the request of the defendant, then being the attorney of and for the said William Townley, and as such attorney acting upon the retainer, at the request of the said William Townley, duly, and according to the form of the statute in such case, then and there made a warrant in writing under his hand and seal, directed to Lloyd Simpson, one of the serjeants-at-mace of the said court, and to Thomas Simpson, keeper of the said debtors' prison, or his deputy, whereby, after reciting that the plaintiff, therein described as Thomas Kinning, &c., on the 7th day of December then last, was indebted to the said William Townley in a sum not exceeding the sum of 3*l.* 12*s.* 6*d.* costs of suit, by force of the judgment therein mentioned, and then being at Fleet-lane, in the city of London, and within the jurisdiction of the said court, was duly summoned to appear on the 12th day of December last, at the said court, to answer such questions as might be put to him touching the said debt, and not having paid to the said William Townley the said sum of money recovered in the said judgment of the said court on the 12th day of December, 1846, meaning the aforesaid judgment; the plaintiff having appeared before the said judge at the place therein mentioned, and it thereupon then and there being shewn to the said judge, by the admission of the plaintiff, that the plaintiff had the means of paying the said debt and costs aforesaid in manner thereafter mentioned, the said judge did then and there order that the plaintiff should pay the said debt and costs to the said William Townley, in manner following, (a) &c.; the said judge, therefore, by the said warrant, willed, required, and authorized the said Lloyd Simpson, immediately upon the receipt of the said warrant, or as soon as might be, to take into custody the body of the plaintiff, and him safely convey to Her Majesty's debtors' prison for London and Middlesex, in the city of London, or to the common gaol, &c., and then and there to deliver him to the keeper of the said prison, who was thereby required and authorized to receive the plaintiff into his custody, and him safely to detain in the said prison for the space of forty days from the time of his arrest under the said warrant, or until he should be discharged out of custody by leave of the said judge; and for the said judge the said warrant should be their sufficient warrant, as by the said warrant appears. And the defendant, so being and as such attorney, and on the retainer and at the request of the said William Townley, then delivered the said warrant to the said Lloyd Simpson, who then and from thence, until, and at, and after the said time when, &c., was one of the serjeants-at-mace of the said court, to be executed in due form of law, and then requested the said Lloyd Simpson to execute the said warrant in due form of law, by virtue of the said warrant, and at the said request of the defendant, the said Lloyd Simpson, acting such attorney and acting on the said retainer, and

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(a) See the form of this warrant fully set out, *ante*, p. 1.

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at the request of the said Wm. Townley, the said Lloyd Simpson, so being and as such serjeant-at-mace at the said time when &c., in the city of London aforesaid, and within the jurisdiction of the said court, took and arrested the plaintiff by his body, and forthwith conveyed him to the said debtors' prison for London and Middlesex, and delivered him to the said keeper of the said prison and the plaintiff was detained in the said prison under and by virtue of the said warrant for the said space of thirty-nine days; the declaration mentioned; the said sum of 2*l.* during all that time and still being wholly unpaid and unsatisfied; and on the occasion and for the purpose aforesaid, the plaintiff was necessarily and unavoidably a little seized and laid hold of and pulled and dragged about, &c.

To this plea the plaintiff replied, that by the said order was not directed that the plaintiff should be committed *et formâ*, and concluded to the country. On the trial, the defendant, in order to sustain this issue, produced a commitment made by the judge of the Sheriff's Court, which corresponded with that described in the special plea, but which contained no statement of any previous summons to the plaintiff to show cause why he should not be committed. The jury, under the direction of the learned judge, found on this evidence for the defendant. A rule was afterwards obtained on behalf of the plaintiff to show cause why there should not be a new trial for misdirection, or judgment for him *non obstante veredicto*, and the ground of the rule was, that the order was bad for want of such previous summons, and that either the plea, in order to make it a good plea, must be understood to allege that the judge made a valid order, in which case he ought to have directed the jury to find for the plaintiff; or that the plea was no good bar, for want of the allegation of such previous summons; in which case the plaintiff would have been entitled to judgment *non obstante veredicto*. On showing cause, it was contended on behalf of the defendant that the traverse did not put in issue the validity of the order, but only the question whether, in fact, the order was made as described in the plea, and therefore the verdict was properly found for the defendant; and further, that it was not essential to the plea that the order should be valid, inasmuch as the defendant appeared to have merely done the duty of an attorney of one of the litigant parties in execution of the order of a judge of a court of competent jurisdiction, and that an attorney so acting is protected, whether the order be valid or not. It was also contended that the order was good on the face of it, for it was not necessary that the issue of the summons should be stated. But we are of opinion that these arguments are not well founded. It is true, if an attorney does no more than set a court of competent jurisdiction in motion on behalf of his client, he is no trespasser, notwithstanding such a court should, on his motion, do an act of trespass by its officers, and he was therefore entitled to the verdict under the plea of not guilty, if an action were brought against him, in respect of

an act of trespass. But where, by a special plea like the one in question, he attempts and undertakes to justify his concurrence, we are of opinion he can only make out his justification by producing the written authority under which he acted; and, consequently, it is essential to the defence in the present case that the order relied upon should be a valid order. Accordingly, we think the special plea, where it avers that the judge of the Sheriff's Court, duly sworn according to the form of the statute, ordered the plaintiff to be committed for forty days, &c., must be understood to aver that the judge made a valid order to that effect, and the replication, by averring that he did order the plaintiff should be committed in the same manner and form, &c., raised an issue which the defendant cannot maintain without proving a valid order; for, if this issue were to be found for him, it would be inferred, after verdict, that the judge at the trial had construed the plea in the sense requisite for its validity; and that, consequently, such an order had been proved, otherwise the jury would have found for the defendant; but, in the present case, the order produced at the trial was in the very terms of the judgment which this court has already decided in *Ex parte Thos. Kin- (1 Cox, Mac. & H. 16)*, on the occasion of the plaintiff being brought here on a *habeas corpus*, to obtain his discharge out of custody, and was invalid on the face of it, on the same ground of objection as was taken in the present case against the validity of the order on which the warrant was founded; and it appears to us, on the principle of that decision, we must construe the order to be invalid, and therefore the defendant having failed to maintain the issue, the judge ought to have directed the jury to find for the plaintiff; for these reasons we think the rule must be absolute for a new

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Rule absolute for a new trial.

COURT OF COMMON BENCH.

*February 21, 1851.**County Court Appeal.*

(Before MAULE, WILLIAMS, and TALFOURD, JJ.)

THE EAST ANGLIAN RAILWAYS COMPANY v. LYTHGOE

*Master and servant—Dismissal—Set-off—County Court appeal,
the subject of—13 & 14 Vict. c. 61, s. 14.**The audit clerk of a railway company, under an agreement for 14
year, determinable by three months' notice, or payment of three m
salary, was improperly dismissed without notice; and being su
the company for moneys in his hands belonging to them, claimed t
off the three months' salary to be paid under the agreement for a
proper dismissal without notice.**Held, that he was entitled to set it off.**Held, also, that the question whether the cause alleged for the dism
viz., the disclosure, to the prejudice of his employers, of facts acq
by virtue of his employment, was a question of fact, and not the
ject of appeal under the County Court Extension Act.**Quære, whether the decisions of a County Court judge, in cases
there is no jury, upon a question of fact mixed up with law, i
subject of appeal under the County Court Extension Act.*

THIS was an appeal under the County Court Extension
the 13 & 14 Vict. c. 61, s. 14, from the decision of the j
of the County Court of Lynn, in Norfolk.

The following case was stated for the opinion of the Court:

In the County Court of Norfolk, Lynn.

Court held November 9, 1850.

Between the East Anglian Railways Company, plaintiffs, a
James Lythgoe, defendant.

This was an action brought in the County Court of Nor
held at Lynn, for 30*l.* claimed by the plaintiffs to be du
them from the defendant as money had and received to
use.

Upon the trial of the cause, it was not denied that the m
had been received by the defendant on account of the comp
but the defence was a set-off for a larger amount, viz., 35*l.*, all
by the defendant to be due to him from the company, for t
months' salary as their clerk, and the question between the pa
was, whether this set-off could be supported.

The facts, as they appeared in evidence, are these :—

defendant was the audit-clerk to the plaintiffs, under an agreement for 140*l.* a year, determinable by three months' notice, amount of three months' salary. The whole of the traffic of the company's railways, and all other the books of the said plaintiffs, were under the defendant's charge and accessible to his inspection. It was part of the defendant's duty to keep up from week to week the statistics of the said railway in a view to their publication to the shareholders at the half-year. It might be of importance to the interests of the shareholders that such information should not transpire at the periodical meetings, so that no unfair advantage should be derived from priority of information. In the month of August 1850, it was discovered that the defendant was carrying on correspondence with Mr. Eadson, the traffic manager of the Lancashire Railway, and also with Mr. Murnane, a clerk of the Eastern Counties Railway, who transacted at Ely on behalf of the Eastern Counties Railway Company as well of the Eastern Counties Railway Company as of the East Anglian Railways Company, the latter company having an arrangement with the former for the use of their station (Mr. Murnane not being the servant of the East Anglian Railways Company, as assumed in the judgment copied). Upon this discovery, the directors challenged the defendant on the fact, which he for some time strenuously denied, but which he produced a manifold writer, in which there appeared, in his handwriting, the three letters marked A, C, and E, annexed, which the defendant admitted to have written. The directors thereupon discharged the defendant from his employment. On being informed that he was discharged, the defendant wrote to Messrs. Vell, gentlemen, I shall not seek a reversal of your decision for I feel that I have deserved it all."

Letters A and C were put in evidence by the defendant's counsel, and the letter E was put in evidence by the plaintiffs' counsel, but the defendant denied that he had posted the letter E, at the same time he admitted the facts above stated in reference to the circumstances of his discharge, and also that he had not, on any previous occasion, denied the fact of such letter. He admitted the posting of letters A and C. The plaintiffs objected to the admission of any evidence in support of the defendant's set-off, on the ground that the claim, if any, was for damages, which could not be the subject of a set-off, no service having been performed during the months, in respect of which the salary was claimed, and as time had not having elapsed at the commencement of this

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JUDGE, in giving judgment, said, the question is not whether the company was justified, morally or even legally, in dismissing the defendant, but whether it was justified, legally, in dismissing him without notice or payment of three months' salary. It was then held in *Callo v. Brouncker* (4 C. & P. 518), that to obtain a dismissal there must be proved against him moral

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misconduct, pecuniary or otherwise, wilful disobedience or hab neglect. Neither of the two latter is imputed to him. He been guilty of the former? I think he would have been guilty moral misconduct if it had been proved against him that he use of a knowledge acquired by virtue of his employment to prejudice of his employers. Let us examine whether there is proof of that; and let it always be remembered that it is the of any one making such a charge to support it by legal proof. A great writer has said, "Thoughts are no subjects. A man right to think what he pleases, and also to commit his thoughts to paper, provided he does not allow any one to see the paper. Therefore, as the first letter was never published, I am bound to dismiss it from my consideration, for the burden lies upon the company to show that he not only contemplated committing but actually commit such an offence as I have described. I now examine the second letter. That letter begins by giving information which the company had actually had written for the very purpose of giving such information. As the company was not prejudiced by its earlier communication, there was no injury to the company in making it. But it also charged the company with being addicted to shuffling conduct. This was a most improper communication to proceed from an *employé* of the company, and would, morally, abundantly justify the company in dismissing the defendant, but it will not legally justify it in dismissing him without notice or salary, because I think a good test by which to try it is this, that in an action for the libel damages would be recovered unless special damage were proved. The remainder of the letter seems to breathe considerable personal hostility to Mr. Bruce, but it is not a matter affecting the company. If there had been anything apocryphal in the letter, it was the duty of the company to prove it. All that can be collected from it is an exhortation to Mr. Murnane, a servant of the company, to do his duty. This duty was to look well to the accounts, and it would be his interest to do his duty. Were there had been any suspicion that he had been remiss, I know that but an exhortation to a man to do his duty cannot be an offence to whoever may give it. For these reasons I do not think that the company has made out a legal justification for dismissing without notice, and the set-off must be allowed.

The question for the opinion of the court is, whether the set-off was properly allowed?

The letters alluded to were appended to the case, and were as follows:—

Lynn, Norfolk, May 21, 1851.

DEAR SIR,—In the absence of the secretary, I opened your letter, for payment of your expenses, 34*l.* 3*s.* The request for the amount appear "nobby," and I wish you may get it. (the secretary's *factotum*) has written to Bruce for particulars that the bill may be laid before the Board on Friday next. Clay and I are getting on famously together; but I regret

tions are not worth three months' purchase. There is a good deal of angry feeling on the part of the bondholders; doubt not but the lines will be let to Baxendale or some other capitalist. Our traffic is miserable, and insufficient to pay the interest per cent. to the creditors.

Trusting you are well, I am, &c.

W. Adson.

J. LYTHGOE.

Lynn, Norfolk, May 25, 1850.

SIR,—I have just seen the letter which Bruce has written to be written in answer to your solicitor. It appears that Bruce, who is absent from Lynn, has got your bill somewhere in his possession, for it cannot be found. This is just the kind of thing that people like to make, and you will have no hesitation in treating it as humbug practised by Humbug Bruce. When the next date bill comes to him you will have to wait until the next day, fourteen days hence, before it can be paid (if paid). I need hardly remark that our committee of creditors and consider it an extortionate amount. That they should do so is an idea pleases me right out, for I know they will complain of Bruce until he becomes thoroughly wild. Wishing you to receive the 34l. 3s. net cash,

I remain, yours respectfully,

W. Adson, Esq. Lancashire.

J. LYTHGOE.

August 5, 1850.

SIR,—Look well over the Hartleypool Coal Company's accounts and see that they are all paid to you. I am in hopes you will find something to your advantage in this matter. I have private reasons for drawing your attention to this, and I desire you to keep this communication to yourself.

Yours truly,

W. Burnane.

J. LYTHGOE.

Now for the appellants.—It will be contended—first, that the dismissal of the defendant by the company was justifiable: secondly, that if it was not, this claim for a quarter's salary was the subject of a set-off. [MAULE, J.—Is there any evidence in this case except a mixed one of law and fact? A number of expressions are set out, and a number of expressions are given which have fallen from the judge; but all that we can take notice of is that he gave judgment for the defendant. Suppose that he gave so great a number of bad reasons for his judgment, we can take notice of those reasons; but if, when he came to give his judgment, his judgment was right, that cannot be disturbed for the sake of the reasons given. An appeal is given by the Vict. c. 61, s. 14, in certain cases only, "if either party is dissatisfied with the determination or direction of the court on the point of law, or upon the admission or rejection of any fact." Now, if the judge has the facts left to him in a case, you cannot separate the law and the fact, I have great

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doubt whether an appeal is given in such a case.] It is for the court to say whether, upon the facts found in this case, the defendant has been guilty of moral misconduct towards the plaintiff his employers. [MAULE, J.—How has the judge found an appeal when he says certain letters were put in evidence, and the defendant denied that he had posted letter A; is that finding a fact or stating evidence? There is no fact found that he sent the letter, or that he did not send the letter.] It is found that the defendant wrote the letter. The effect of the judgment is to vitiate the judgment itself, if given according to right. [MAULE, J.—This is not in the nature of a special case, from which the court are to draw inferences from the facts stated.] The dismissal of the defendant was justifiable on the *corpus* of the case as stated. The defendant was the audit-clerk of the company, and had full information as to the money transactions, to the exclusion of all other persons; and if it was his duty to keep that knowledge secret, the company were not bound to wait till some person was sustained from the disclosure, but were justified in disclosing it to him, on finding that he had written the letter in question. [WILLIAMS, J.—What ground of dismissal would you have if the plea charged the defendant with immoral conduct. [MAULE, J.—Suppose the plaintiff to have replied *de injuria* to such a plea, what would the jury have had to find?] That the party has been guilty of immoral conduct. [MAULE, J.—Then the judge has found that fact, and can we review it now? WILLIAMS, J.—One of two things would have happened at the trial; either there would have been no evidence in support of the plea, and the judge must have directed that there was some evidence in support of it, or the judge must have directed that there was no evidence in support of it, and left it to the jury to find whether the plea was proved. If the judge then, are we to know to which state of things the judge has formed in this case?]

Worlledge (who was for the respondent) cited the case of *Worlledge v. Thompson* (8 C. B. 44), in which it was left to the jury to find whether the servant had been guilty of any wrongful or disobedient conduct, and that direction and finding were upheld.

Wheeler.—In *Fillieul v. Armstrong* (7 A. & E. 563), Denman, C. J. said: "Then the question is, whether the defendant had a right to dismiss the plaintiff for any cause well alleged. Now, the defendant does not say that the plaintiff has been guilty of any immorality, nor does he show that the plaintiff was really obliged to hire another person, or that the plaintiff's contract was not, in fact, adequately filled. He says, indeed, that the plaintiff was delayed and injured in respect of matters and business in which he would have employed the plaintiff during the time, but he does not say that the instructions in French or drawing were impeded, or that the business of the school was suspended."

le hour. Although, therefore, the defendant might possibly be entitled to sue the plaintiff for absenting himself, the record shows nothing which puts an end to the contract." The justification of the dismissal is the legal inference from the facts: (*Amor v. Caron*, 9 A. & E. 548.) [MAULE, J.—Your argument proceeds on the erroneous supposition that the matter of the judgment is subject of appeal. Whether there is any appeal in the case before us is to me a matter of very great doubt. I am inclined to think that the appeal is confined to cases before a jury. It is perfectly true that the defendant could not, under the circumstances of his case, sue in *indebitatus assumpsit* for wages, but the question whether there was not such a liquidated sum agreed upon between the parties, for the breach of the contract, as may be the subject of a plea of set-off.] *Fewings v. Tisdal* (1 Exch. 265), shows that a menial servant, entitled to a month's warning or a month's wages, cannot recover a month's wages for having been improperly dismissed without a month's warning, upon the *indebitatus* count for work and labour. From that case it would seem that the claim in this case is not the subject of set-off for work and labour. MAULE, J.—Do you say that no plea of set-off could be framed in which the quarter's salary could be the subject of set-off? Then the judge below rejected the first letter, which was admissible in evidence. [MAULE, J.—No. The letter-book, and every thing in it, was put in evidence. The judge only withdrew from his mind in deciding upon the case. In his capacity of judge he allowed every scrap of evidence to be presented, but as a jury he dismissed it from his consideration.] The defendant's reply writing the letter was an act of misconduct injurious to his employers. It was not denied that it was intended to be sent. Putting the three letters together, the judge might have come to the conclusion that the dismissal was justifiable, but he rejected (or rather, while he nominally admitted the three, he really rejected one.) [MAULE, J.—The letters were so many pieces of evidence in support of one entire proposition, which is for the jury and the court to find: and that is not subject to review.] Secondly, the claim was not the subject of set-off at all: (*Cutter v. Powell*, 6 Mith's L. C. 1, was referred to.) The defendant was not dismissed contrary to the contract. [MAULE, J.—He was dismissed simply under the contract, only the plaintiffs thereby incurred the liability to pay him an agreed upon sum.] This was not an agreed upon sum. [TALFOURD, J.—It is found so: three months' notice and three months' salary.] *Fewings v. Tisdal* shows that the only remedy for the recovery of that sum is by a special count. MAULE, J.—Is it not possible by a competent form of *indebitatus assumpsit* to recover this sum for being dismissed without notice? The plaintiffs had a right to dismiss the defendant at their will, and they incurred the liability to pay a certain sum agreed upon in that event. Where there is an agreement that if the master dismisses his servant away he will pay him 20*l.*, is not that the

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subject of set-off?] He then referred to *Howlett v. Strickland*, 13 Q.B. 107, (a) Cowp. 56. (a)

Worlledge, contra, was not called upon.

MAULE, J.—There is no doubt at all that if there is a point of law in this case, it is that respecting the set-off which the learned counsel for the appellants has very ably argued. It is clear that where there is an agreement to pay a certain sum on a certain event, an action will lie for the recovery of that sum; and it becomes a debt as soon as the event happens, and is a subject of set-off. If that is the point raised in this case, I am of opinion that it was well decided. It is quite clear that no decision upon a point of fact can be reviewed. The act gives a right of appeal in case of a determination in point of law, or upon the admission or rejection of evidence. But it is said that this determination can be reviewed on the ground of the improper rejection of evidence. In the present case, however, it does not appear that any evidence was rejected, or that there was any objection to the admission of evidence; on the contrary, every thing that was offered to have been received that was offered. But then the judgment coming to a conclusion let fall (as it is said) some observations which possibly may be liable to criticism. If it were not so, it would be very different from the observations which fall from the judges of all sorts when they are speaking extemporarily, endeavouring to satisfy both parties by showing that they have attended to what has been urged on behalf of each. The observations, however, are not binding upon the court. The parties. If the judgment can be sustained for any reason, it may be sustained, notwithstanding that the particular point for which it was given may have been wrongly assigned. It must, therefore, entirely exclude what the judge says in the course of observation or statement of his reasons in giving his judgment. For, legitimately speaking, they are not part of the case, and must be struck out of it. We have then to consider the judgment. It seems to me that the law and the facts of this case are mixed up together, and my opinion is, that there was not in such a case intended to be any appeal. An appeal lies, properly speaking, upon the determination of some point of law,—as, suppose an action of *assumpsit* brought in a case for which no such action lies, or that a breach of contract is alleged, in fact, and there has been no breach of contract at all. In such cases a judge may say that there was no cause of action, or no evidence in support of the action. That would be a determination in point of law, and is a direction in point of law, the same as when in a Scotch Court a judge, in directing a jury, says the law is so and so, and the construction of such an instrument is so and so. But, in

(a) That case decided that in an action of covenant, unliquidated damages arising from the breach of other covenants to be performed by the plaintiff, could not be pleaded in set-off.

no difficulty: for the law and the facts will be separated, the judge will decide on the facts, and the judge on the law, and if any error is committed, it will be in the determination of the law, or in the admission or rejection of evidence. It is true that in cases of appeal where neither party has thought fit to have the matter tried before a jury; and I think that would be a wise view of the matter so considered, because many parties would be glad to have the decision of the judge, and be content that he should decide between them, perhaps in the hope that he will give in their favour, but after a decision against them would be content to do any little thing they could, and make of it a ground for an appeal.

There may be cases in which inconvenience may arise from allowing an appeal in cases under 5*l.* involving law and fact together, but in cases above 5*l.* where either party may have the right to appeal, it is by the consent and will of the parties if the matter is referred to the decision of the judge, much in the same way as an arbitrator's decision is not to be rescinded for errors either in law or fact. In legislation it is often necessary to decide a balance of evils, and certainly it is according to the spirit of much legislation, that when a small sum only is in dispute, a particular mode of decision is given, which is not to be reviewed. Various considerations, and others, make me doubt whether an appeal is in such a case as this. Assuming that it does, the only law in this case is the question of set-off, and as to that, I am of opinion that the decision of the judge was right.

JAMES, J.—I am of the same opinion. The ground of appeal is, that the judge was wrong in allowing the set-off in this case; but, for the reason already given, I think that the claimant was properly dismissed, was disentitled to the three wages: but it seems to me that it was a question of fact

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right. If there had been a plea of wilful disobedience to orders of misconduct injurious to his employers, the issue would have been one of fact compounded of many facts. We cannot, therefore, review the decision the judge came to on this point. Then as the rejection of the first letter, I think it was properly received evidence by the judge, but dismissed from his mind in coming to conclusion upon the material facts in the case.

Worledge applied for costs.

Wheeler suggested that costs should not be given, as some doubt had been expressed by the court as to the jurisdiction in this case. The court, however, granted costs.

Appeal dismissed with costs.

COURT OF COMMON PLEAS.

Michaelmas Term, 1850.

MC GILL v. MILTON.

Suggestion—Time of applying for—Service of rule—Costs.

The cause was tried on the 30th of May. A rule nisi for a suggestion was obtained on the 5th of June; on the 6th the plaintiff signed judgment; and on the 7th the defendant served the rule.

Held, that the application was made in time, and the rule was made absolute on payment of the costs of the judgment.

PIGOTT showed cause against a rule nisi for a suggestion to deprive the plaintiff of costs, and to set aside the judgment which had been signed, and contended that the application was analogous to an application for a new trial, and ought to be made within the first four days of term. The cause was tried on the 30th of May, and notice given on the following day that a rule nisi for a suggestion would be moved for on the 4th of June. The rule nisi was obtained on the 5th of June; on the 6th the plaintiff signed judgment; and on the 7th the defendant served this rule.

R. B. Miller, in support, cited *Reed v. Blaney*, 1 Cox, 337, & *Hertslet*, 337. There is no general rule, so that the rule obtained within a reasonable time, that is all that is requisite.

COURT OF COMMON BENCH.

November 15, 1850.

REICHART v. LAMBERT.

Practice—Suggestion—Time of applying for—Costs.

was tried in the Sheriff's Court on the 31st of October; notice of costs was served on the 5th of November, final judgment given, and execution issued, on the 6th; a summons to stay proceedings taken out by defendant on the same day. On the 8th of November defendant applied to the court for a rule to enter a suggestion to deprive the plaintiff of costs; and the court made absolute the rule for payment of the costs of the judgment.

On for a rule for a suggestion to deprive the plaintiff of costs, it is necessary that the application be made within the first four days of the term. All that is required of the defendant is, that he use "due diligence," and make his application within a "reasonable time."

IN, on a former day, had obtained a rule calling on the plaintiff to show cause why the roll should not be carried in, and a suggestion entered thereon, to deprive the plaintiff of costs, under the 39th section of the County Courts Act. The affidavit on which the rule was moved stated that the cause was tried in the

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show that an application of this kind, to be in time, must be within the first four days of Term: (*Garratt v. Babington* & L. 820; *Godson v. Lloyd*, 4 Dowl. 158.) In the case now the court the application was made two days after final judgment. [MAULE, J.—You may surely move after judgment.] Yet that can only be done within the first four days of Term. There are, however, cases where it has been held that such an application cannot be made after final judgment: (*Unwin v. King*, 2 M. & W. 593; *Calvert v. Everard*, 5 M. & Scott, 510; *Smith v. Telford*, 16 M. & W. 273.) (b) Instead of being moved within the time, this motion was not made till the seventh day of Term, which, it is submitted, is unreasonable. The defendant allowed to be taxed, judgment to be signed, and execution to be taken, and then asks the court to grant a suggestion to deprive the plaintiff of his costs. If application for a suggestion was not made within the first four days of Term, in the case of *Smith v. Telford*, cited, it was necessary in like manner in the present case. The court, therefore, seeing the inconvenience that would arise if there were not a reasonable limit to the time for moving these rules, discharged this rule.

Objections were also taken to the sufficiency of the affidavit on which the rule was moved, on two points: first, that the affidavit stated that neither the plaintiff nor defendant was, at the time the rule was brought, an officer of the court, was not sufficiently certain; secondly, that the affidavit did not state that defendant, at the time of action brought, lived within the jurisdiction of the district Court of Hammersmith. The defendant might reside within the district County Court, and not be within the jurisdiction of that particular court.

The COURT called upon *Horn* to confine himself to the objection against the rule being moved too late.

Horn.—This is the first time in which an objection has been taken that it is too late to come to the court after judgment. The rule that is required is to come to the court within reasonable time, and we have done so here. It has been held that you may move for a suggestion after judgment and execution; but, if you move for a suggestion after judgment, the application must be to set aside the judgment and execution, and then enter a suggestion. There is an authority

(b) In that case the plaintiff sued the defendant for goods sold and delivered, and obtained an affidavit of debt in bankruptcy against him under 5 & 6 Vict. c. 122, for 104*l.* 1*s.* 6*d.* A summons issued against the defendant under that act, but on his making affidavit that he believed he had a good defence, it was dismissed. Defendant then pleaded a set-off, and the trial proved it to the amount of 29*l.* 5*s.* Verdict for plaintiff for 75*l.* 13*s.* 5*d.* The judge gave a certificate for speedy execution, and on the 7th August the plaintiff signed judgment, and issued execution. On the 21st November a rule was granted under the provisions of the above act to enter a suggestion and to compel the plaintiff to return to the court the moneys paid to him under the execution with costs; on the ground that the plaintiff had no reasonable or probable cause for making the affidavit of debt in bankruptcy. The motion was made too late; and by three Barons (Parke, B., *dubitante*) that where speedy execution is granted in vacation under 1 Will. 4, c. 7, and executed, the defendant must apply within the first four days of the ensuing Term, and in the meantime before judgment is signed and execution issued.

case of *Soames v. Cooper* (3 Exch. 38.) (c) That was a case under the County Courts Act; not a word was there said as to necessity of moving within the first four days of Term. All cases cited as authorities for the limit of four days are cases under old and different acts of Parliament. The proper rule is laid in *Hippesley v. Laing* (4 B. & Cr. 863); it is there said you must come in reasonable time. The question, what is a reasonable time for coming to the court, was settled by Wightman, J., in the last Court. That was a case, somewhat the converse of the last, in which it was held that the application was made too late: (*Sangster v. Bingham*, 12 L. T. 401, C. P.) (d) A party may reasonably be held to be too late, if he permits, as in that case, twenty days to elapse after judgment before he moves for his suggestion. We have been told sufficient in our affidavit to throw on the plaintiff the burden of showing that we came too late, and he has failed in his endeavour. It is therefore submitted that this rule should be made absolute.

PER CURIAM.—During the discussion of this case the court disposed of the objections to the sufficiency of the affidavit on which this rule was moved, so that it is not necessary to allude to them again. The question remaining for consideration is as to the time at which the application was made. It is contended that it was made too late, and that on two grounds:—First, it is said that the application should have been made before final judgment was signed; but the authorities which show that, before making an application to enter a suggestion you must move to set aside the judgment, show also that under certain conditions you may make the application after judgment is signed. The form of the application, then, is to set aside the judgment on payment of costs, and thereupon to enter a suggestion. Of course, notwithstanding the form of the application, all costs to which the plaintiff has been properly put, by reason of the defendant's not coming before will be reimbursed. But it is said the application should have been made within the four first days of Term, and one case has been cited to establish that principle. Now, the case of *Smith v. Temby* does not establish that proposition. What is there said is authority for such a rule; the application should be made within reasonable time, and with due diligence. Now, the other question is, what is "due diligence?" The matter is one in which undoubtedly the defendant should be allowed time for consideration. The difficulty arising upon the pleas may only become important after the verdict has been delivered. Now, in this case the trial took place on the 30th of October, and notice of taxation was given on the 5th of November; judgment was signed on the 6th, and execution issued; and on the 8th this motion was

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) There it was held that a defendant cannot move to enter a suggestion to deprive the plaintiff of costs without also moving to set aside the judgment in case judgment has been signed. *Smith v. Temby*, reported in the same volume, is a similar case.

d) In that case the cause was tried in December. On the 5th January final judgment was given. Application was made on the 23rd of the same month for a rule for a suggestion, and it was refused on the ground that the application was too late.

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made. We do not think, under these circumstances, it can be said the defendant has not used due diligence. We think, therefore, we must make the rule absolute.

Horn applied for costs.

JERVIS, C. J.—Those who come to ask for a favour ought to pay the costs of that favour. (After some consideration.) The court thinks the rule should be absolute in its terms, that is, say, on payment of the costs of the judgment only.

Rule absolute.

COURT OF QUEEN'S BENCH.

November 23, 1850.

Re JAMES WRIGHT.

Compensation for loss of offices, and for loss by substitution of offices for fees.

Under ss. 38 and 39 of the 9 & 10 Vict. c. 95, it is competent to the Lords of the Treasury, in dealing with claims for compensation on those sections, to consider whether, under all the circumstances, the applicant is a loser or gainer by the statute, and if the latter, to refuse to grant any compensation.

Therefore, where an applicant had held the offices of registrar and clerk in a court abolished by the statute, but became, by virtue of the statute, clerk of the County Court established under it, for which he was paid by fees, and afterwards by fixed salary, and failed to show that he had, in fact, sustained any loss by the change,

Held, that he was entitled to no compensation under s. 38 or s. 39 of the statute.

A RULE had been obtained, calling upon the Lords of the Treasury to show cause why a writ of *mandamus* should not be issued, commanding them to admit the claim of Mr. James Wright for compensation on account of the loss of the offices of registrar and crier, which he formerly held under the old County Court of Middlesex, and which were abolished by the 9 & 10 Vict. c. 95, and to award him such compensation as they should think reasonable in respect thereof. The material facts upon which this application depended were the following:—Mr. Wright, being

istrar of the old Middlesex County Court at the time of the passing of the 9 & 10 Vict. c. 95, was entitled, under s. 34, (a) to the first clerk of the new court established under that act. Accordingly, as soon as that act came into operation, and the new County Court was established, in April, 1847, he became clerk of the new court, and from that time, until December, 1849, was paid fees. In December, 1849, by order in council, a salary of £100 a year was substituted for the payment by fees; and it appeared from Mr. Wright's affidavit that the salary was considerably less than the sum which he had obtained by fees. He did not, however, state that the joint emoluments of the two offices in the old court were greater than, or equal to, the salary which he now received.

For *A. Cockburn* (Solicitor-General), *M. D. Hill*, and *Welsby*, the same cause.—This claim depends upon ss. 38, 39 of 9 & 10 Vict. c. 95. First, under section 38 (b) compensation is claimed for loss of the office of crier; but if it appears that by this very act the claimant has got an office of equal or greater value, he has no claim at all; he is not a loser by the act; and the Legislature meant only to provide an indemnity against loss. The proviso, which says that

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Sect. 34 enacts—"That the persons holding the offices, or performing the duties, of clerks or bailiffs in any court holden under any act cited in either of the said Schedules (A.) and the 1st day of June in this year, and who shall continue respectively to hold the same offices and perform the same duties at the time when such act shall be repealed under the provisions of this act, whether or not qualified as hereinbefore provided, shall be entitled, if not disqualified by this act, to be first clerks and high bailiffs of the same court when holden as a County Court under this act, and shall continue to execute their several offices, &c. Provided always, that the clerk of any court cited in the said Schedule (A.) shall, within one calendar month after the repeal of the act under which it is now holden, decline to accept the office of clerk of the same court as holden under this act, it shall be lawful to the Commissioners of Her Majesty's Treasury, if they shall think fit, to take into consideration the special circumstances of each case, and to award such compensation to be paid to such clerk as under the circumstances they shall think reasonable in the manner herein provided, in the case of persons whose emoluments will be diminished or taken away by this act."

Sect. 38. "That every person who is entitled to any franchise, right of appointment or right of election under any of the acts under which any court mentioned in the said Schedule (A.) is now holden, and every person who shall have been entitled to any fees or salary for his services in the execution of any of the same acts, or for the issue of any writs to the sheriff out of the Court of Chancery, and also every person who is entitled to any franchise or right of election to hold office in any court in any district in which the County Court had not been established before the passing of this act, and in which district a court shall be established under the provisions of this act, and also every person holding any office in any such last-mentioned court whose franchise or right of appointment or office shall be affected, abolished, or altered, or whose emoluments shall be diminished or taken away under the operation of this act, shall be entitled to make a claim for compensation to the Commissioners of Her Majesty's Treasury within six calendar months after the passing of this act, or after the alteration of the office: and it shall be lawful for the said commissioners, in such manner as they shall think proper, to inquire what was the nature of the franchise or right of appointment, and what were the lawful fees and emoluments in respect of such office, and what compensation should be allowed; and the commissioners in such case shall determine the gross or yearly sum and for such time as they shall think just to be awarded upon the special circumstances of each case; and all such compensations shall be payable out of the Consolidated Fund of the United Kingdom of Great Britain and Ireland: provided, that if any person holding any office in any of the said courts shall be appointed to any public office or employment, the payment of the compensation awarded to him under this act, so long as he shall continue to receive the salary or emoluments of such office or employment, shall be suspended if the amount of such salary or emoluments is greater than the amount of such compensation, or if not, shall be diminished by the amount of such salary or emoluments." &c.

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payment of the compensation shall be suspended so long as the party holds another office of equal value, shows that in fact it would be wholly nugatory, if the Lords of the Treasury were to go through the form of awarding compensation. Then section 39, (c) a claim is made on account of the substituted salary for fees; but the Lords of the Treasury are, in this case, as well as the other, to look at all the circumstances of the case, and see whether any loss has in fact been sustained. A comparison must be instituted between the emoluments under the old act, and those of the office under the new act,—not the amount of fees under the new act, and the amount of fees substituted for the fees.

Sir F. Thesiger, Crowder, and Ogle, contra.—First. The office of the old court, is abolished by this act of Parliament, and therefore Mr. Wright is clearly a person entitled to compensation under section 38. He is within the very words of the section; and then, the proviso for suspending payment of compensation makes it clear that the Legislature intended compensation to be awarded, though the claimant should become possessed of another office of equal value.—[LORD BELLAIR, C. J.—That proviso may well be intended to apply to a case, where some office is conferred after the Treasury has actually awarded compensation.] It is not limited to such a case, and the object was to give the party security in case he loses the new office. [COLERIDGE, J.—The claim for compensation must be made within six months from the loss of office, if the claim is not to be entertained whilst he holds another office of equal value, a great hardship upon him might be the consequence, for at the end of seven months he might, by son or other, become incapacitated from holding the new office, and it is quite uncertain how long Mr. Wright may be able to hold his present office; the County Court may be abolished in council; and he is entitled to have the amount of compensation awarded, though the payment may be afterwards suspended in his case, however, it would not be suspended at all; but he was not appointed "after the passing of the act," but by

(c) Sect. 39. "That it shall be lawful for Her Majesty, with the advice of Council, to order that the judges, clerks, bailiffs, and officers of the courts holden under any act, or any of them, shall be paid by salaries instead of fees, or in any manner or otherwise provided by this act; and if Her Majesty shall be pleased, with the advice aforesaid, to order that any such court shall be abolished; or that the district of any such court is holden shall be consolidated with any other district; or if any act passed whereby it shall be provided that the said courts, or any of them, shall be otherwise constituted, than is provided by this act, no such clerk or bailiff, or any judge, clerk, treasurer, or other officer of any such court, shall be entitled to any compensation of ceasing to hold his office, or to receive the fees allowed by this act, or of his emoluments being affected by such abolition or alteration, unless he shall have acted as judge, assessor, county clerk, treasurer, clerk, bailiff, or other officer, before the passing of this act, in any of the courts mentioned in the Schedule (A.) to this act annexed thereto; and in any such case he shall be entitled to compensation for the loss of his fees or emoluments, in like manner as he would have been entitled thereto under the regulations contained in the said act, in case he had been deprived of any fees or emoluments by the passing of this act," &c.

acts. 34, 142.) He is, therefore, not within the terms of the

Secondly. The claim in respect to the other office rests upon the grounds, and is within the provision contained in sect. 39. The claimant does not claim compensation for losing the office of clerk, because the office of clerk under the new court is substituted for it. [ERLE, J.—I cannot recognise that identity between the office of registrar under the old, and clerk under the new.]

It seems to me that, if his argument is right, he might well claim compensation for his office of registrar as for that of clerk. No: the old office is merged in the new; but the new is quite distinct, and might have been held by another person.

The 142nd section, the interpretation clause, declares that the word "clerk" shall mean "registrar." [ERLE, J.—The office is abolished, and then a certain person is pointed out as the person who is to fill the new office. The name of the office is changed as a *designatio personæ*.] Section 39, read together with sect. 142, clearly applies to this case, and entitles Mr. Wright to compensation for the loss which he has sustained by the substitution of salary for fees.

CAMPBELL, C. J.—I am of opinion that this rule ought to be discharged; and I think that this is an unconscientious attempt to obtain a portion of the public revenue on the part of a person whose claim there is not the slightest pretence. It is just and expedient that those who suffer by reforms in the law should be amply and liberally compensated; but it would be monstrous to say that those reforms ought to lead to the advantage of individuals. Now, Mr. Wright makes two errors without attempting to show that he is in a worse position than he was in before the act referred to passed, relying upon grounds used in the statute, without looking to the general scope and object of the enactment. The object of the act certainly was to indemnify, and nothing but indemnity; but in the first place Mr. Wright says he is entitled to compensation for his office; and he relies upon the words in sect. 38, "every person whose office in such last-mentioned court, whose office shall be abolished, or taken away, or whose emoluments shall be diminished or taken away under the operation of this act, shall be entitled to make a claim for compensation." Well, that must entitle him to compensation for some loss—if there has been no loss there can be no compensation; and then "it shall be lawful for the said commissioners to inquire what was the nature of the franchise or appointment, and what was the tenure of any such office, and what were the lawful fees and emoluments in respect of which compensation should be allowed; and the commissioners in that behalf shall award such gross or yearly sum, and for such time as they shall think just to be awarded upon consideration of the circumstances of each case." Does that imperatively bind the Lords of the Treasury in each case to award some compensation even though it should appear that the claimant had not actually benefited by the passing of the act? I think not;

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we must put a reasonable construction upon the words; and as they are to take into consideration the special circumstances of each case, the section must mean that they are to award compensation, if upon all the circumstances they think the claimant entitled to any; but that they are not bound to award compensation if they see that the very same act confers upon him an office of equal or greater value. I quite agree that the proviso is not that which prevents this claim; but I think that where it is clear that the operation of the act does not prejudice the claimant, there can be no compensation. Then, in the next place, he claims, under section 39, compensation, because the salary which he receives is less than the fees; but sect. 39 is subject to the same observations as sect. 38, because the claim for compensation under it is "subject to the same regulations" as the claim under the previous section. Then, has Mr. Wright suffered by the operation of the statute? Compare his situation with what it was before the act passed—not with what it was at the moment of the change from payment by fees to payment by salary. If he received by virtue of the act a very large amount of fees, and that amount has been reduced by an Order in Council, still he is entitled to no compensation, if he is in as good a situation as before the act passed. Upon these grounds, therefore, I think that this rule must be discharged.

COLERIDGE, J.—I am of the same opinion. It appears to me that the proviso to section 38 relating to the suspension of payment, applies only where compensation has been awarded by the Lords of the Treasury, and some appointment is received subsequently, which is not this case. Then does it come within the enacting part of the clause? It is clear that the object of the clause is to give indemnity in case of loss; and very large words are used to show the intention of the Legislature to make the Lords of the Treasury the judges in each case of what is proper to be done. Here they have entertained the claim, and inquired into it, and come to the conclusion that no compensation ought to be awarded. But even if this were not so, and the Lords of the Treasury ought to award something, still if we could see that justice a merely nominal sum ought to be awarded, we should equally be bound to say that this rule must be discharged. The short result of the fact is, that Mr. Wright is better off than he was before, and that by virtue of the act; or, at all events, that he has sustained no loss by the operation of the act.

ERLE, J.—This is a claim by Mr. Wright, who alleges that he is damnified by the 9 & 10 Vict. c. 95, by reason of the abolition of the office of crier of the old County Court of Middlesex; and it is made under sect. 38 of the statute, which empowers the Lords of the Treasury to inquire into such claims, and to award such compensation as they shall think just upon consideration of the special circumstances of each case. It is clear, therefore, that the intention of the Legislature in this transition from one system to another is, that due regard should be paid to vested interests and

at improvement can only be applied to the office of registrar and not to the office of crier, which must be kept quite

The words, however, are quite general, and seem to me to authorize and require the Lords of the Treasury to consider just with reference to *all* the special circumstances of each case. And it would be, I think, an entire perversion of the law to apply the public money to a claim of this kind, because by a strict and literal construction of words it might be brought within it. As to the second claim, Mr. Wright wishes for compensation on account of the substitution of a salary for fees. By sect. 39, all persons so affected by that change are prevented from obtaining compensation, except persons who have acted as officers in the old office before the passing of that act, and they are to be compensated in the same manner, and subject to the same regulations as are provided in sect. 38; so that if the salary falls short of the emoluments of the old office, the party may obtain compensation;

Wright does not pretend to say that it is so in his case; and I think this is an attempt to get the public money without justification.

Rule discharged.

COURT OF COMMON BENCH. (a)

April 4, 1850.

LEVY v. MOYLAN AND OTHERS.

9 & 10 Vict. c. 95, s. 113—*Warrant of Commitment—Form—Issued to judge.*

The warrant of commitment stated that the plaintiff had wilfully insulted the judge, who thereupon ordered him to be taken into custody, and proceeded "these are therefore to require you," &c., to deliver him to the keeper of the house of correction, &c.:

Held, that the warrant was good,—that it was not necessary to state what the insult was; and that the word "therefore" did not render the warrant uncertain, and, in consequence, bad.

Semble, the courts held under 9 & 10 Vict. c. 95, are Inferior Courts.

THIS was a demurrer to certain pleas. The action was brought by the plaintiff against Dennis Creagh Moylan, the late judge of the Westminster County Court, Francis Smedley, the bailiff of the said court, William Flack, the assistant-bailiff, and Lieut. Tracey, the governor of Tothill-fields House of Correction.

Trespass.—The declaration, dated the 2nd day of May, 1849, alleged that the defendants, on the 20th day of February, 1849, made an assault upon the plaintiff, and seized him and pulled and dragged him about, and also pulled and dragged him from and out of a certain building into the public street, and then forced him into a certain public gaol and house of correction, and then imprisoned him, and kept and detained him in prison without any reasonable or probable cause whatsoever.

The third plea of the defendants Smedley and Flack, as to the assault and dragging the defendant out of the building, and forcing him into a gaol, after reciting the passing of the County Courts Act, and notice *sec. stat.* of Her Majesty's intention to commit the propriety of making an order in council, alleged that Her Majesty ordered that the act should be put in force in Middlesex, and that she ordered the county to be divided into divers districts, and then proceeded to set out the district of the Westminster County Court, and that Her Majesty ordered a County Court to be held in some convenient place in the district, and that an order was published in the *London Gazette*, and was in force at the time of the commission of the alleged trespass.

That, at the said County Court in the building mentioned in the declaration, the defendant Moylan being the judge of the court did, according to the form of the said act of Parliament, a warrant under his the said judge's hand, and sealed with

(a) Wilde, C. J., Cresswell, Williams, and Talfourd, JJ.

the judge of the said court, during his sitting in the said court
then as last aforesaid: and that thereupon the said judge did
order that the plaintiff should be taken into custody and detained
during the rising of the said court; and did, therefore, require the said
sheriff, bailiffs, and others in the said direction of the said
court, to take the plaintiff and to deliver him to the
governor of the said house of correction, and by the said
court the said judge did require the said governor of the said
house of correction to receive the plaintiff and him safely to keep
him in the said house of correction for the term of seven days from the
date of the said warrant, or until he should be sooner discharged
by course of law.

the defendant Smedley, the high bailiff of the court, had
ordered William Flack to be a bailiff to assist him, that the said
plaintiff was delivered to these defendants to be executed, and that
the said high bailiff and bailiff, brought the now plaintiff in
to the said house of correction, and delivered the plaintiff
under the said warrant to this defendant, he the defendant then and
thereafter during all the times in the declaration mentioned being the
governor of the said house of correction in the said direction of the
court mentioned. To these pleas the plaintiff demurred.
The plaintiff (Archbold with him) now appeared in support of the
pleas.—The defendant Moylan had died since the commence-
ment of this action, and a suggestion to that effect had been
made on the roll. 1st. The warrant under which the defendants
acted was bad on the face of it for uncertainty. 2nd. It was bad
because it did not state the nature of the insult therein mentioned:
whether by words, gestures or acts, or in what other manner. 3rd.
because it was only an adjudication or order for the imprisonment of the

that is insufficient to justify the magistrate is sufficient to the officer. The cases cited in 1 Hale P. C. 585, and 23, are sufficient to show that there is a distinction made between the responsibility of the judge and of the officer. It was not justification that the judge was acting in a judicial capacity: (*Tarfe v. Lord Downes*, 3 Moor, P.C.C. 38; *Calder v. Bull*, 1 W. 147; *Ibid.* 29.)

JAMES, J.—There are some late cases under the Bankrupt Act where the officer was held liable though the judge was not.

COURT, J.—In the 24 Geo. 2, there is a special provision for the protection of officers. If the warrant were defective, the return, which provides for want of form, is sufficient to support the action; on the above grounds I think the demurrer must be overruled.

for the defendant Tracey.—The case of the governor of the prison is distinguishable from that of the judge or bailiff. Surely it is part of the duty of the governor of a prison to decide on the validity of a warrant. It is his duty to obey it.

He, in reply.—There is no distinction between the judge and the officers, except in those cases in Hale, and they refer to the felony. *Howard v. Gossett*, and *Gossett v. Howard* (in *Judgment*, 10 Q. B. 445, 488, settle this case as to the innocence of the officer investigating the power of the committing magistrate. The contrary practice would create a much greater inconvenience. Suppose this had been a committal for two years, must the governor look at the act to see whether it justified such a commitment? This is not a Superior Court. It is a new court established by an act of Parliament, over whose jurisdiction the Courts of Common Law exercise a power of supervision. This warrant could not be supported. For what offence was the plaintiff committed? Not for an insult to the judge, or because he had ordered him to be

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words. For the above reasons, these pleas did not show a sufficient justification, and the plaintiff was entitled to judgment. *Peacock v. Bell* (1 Wms. Saund. 73; *Houlden v. Smith*, 1 Cox. Macrae, & Hertalet, 303); *Rex v. James*, 5 B. & Ald. 894, was also cited. *Cur. adv. vok.*

JUDGMENT.—May 2.

WILDE, C. J.—This case came before the court upon demand to certain pleas. The action is for an assault and false imprisonment brought against the late judge of the Westminster Court, the high bailiff, his deputy, and the keeper of the house of correction. The declaration is in the ordinary form. The defendant Moylan died after the action was commenced; the other defendants justified under a warrant granted by the deceased Moylan as judge of the court. The plaintiff specially demurred to the pleas of justification. The warrant is set out in the plea. The causes of demurrer relied on in the argument were,—first, that the supposed offence or ground of commitment was upon the face of the warrant uncertain; second, that the warrant recited “that the plaintiff had insulted the judge of the County Court and had been taken into custody, and detained until the rising of the court, and therefore the officer was ordered to take the plaintiff and convey him,” &c. It was argued that the word “therefore” must apply to the last matter recited, in which case the detention of the plaintiff, until the rising of the court, would appear to be the cause of his being committed to the house of correction, which would be absurd, or it must refer to both the matters recited, and then, of the two causes of his committal, one would be altogether insufficient, or it must leave the real ground of committal uncertain; and in either case the warrant would be bad, and being bad on the face of it, would not justify the officers. It was also said that the warrant was bad in another particular, viz., that it did not set forth the nature of the supposed insult offered to the judge, so as to enable this court to ascertain whether any such insult had been offered, and would give the judge power to commit. On the other hand, it was said, that the warrant must be read with reference to the 113th section of the County Court Act, which enacts, that if any person shall wilfully insult the judge or other officers mentioned in the act during the sitting of the court, it shall be lawful for any officer of the court, by order of the judge, to take such offender into custody, and detain him until the rising of the court, and the judge is empowered, by a warrant under his hand, and sealed with the seal of the court, to commit any such offender to prison for any time not exceeding seven days; that the meaning to be ascribed to the warrant then, was, that the party having wilfully insulted the judge, and the judge having ordered him to be detained until the rising of the court, thought fit, by warrant, to commit him to prison for seven days; and also that, with reference to the

(c) Who may be deemed an “officer of the court” under this section. See *ante* p. 35.

shire County Courts, which are undoubtedly inferior; their jurisdiction is limited as to the nature of the causes to be tried, the district within which the cause of action must have arisen, and causes commenced there are removable into the County Courts, except in cases where it is expressly prohibited. 94. Assuming that the warrant in question is to be taken as having been issued by the judge of an inferior court, we nevertheless think that it sufficiently describes the offence for which the party was committed. In the first place, the recital of the warrant that he had done so according to the case of the *King v. Middlessex*, reported 11 A. & E. 273; (d) and as the effect of the statute gives the power to commit for any offence committed by the judge or his officers, or for any wilful interference with the proceedings of the court, or any other misbehaviour, and as many acts may come within that provision which it is impossible adequately to describe in words, it seems to us that the judge had jurisdiction to decide conclusively, whether the particular act did amount to an insult, or interruption, or misbehaviour.

It was, therefore, unnecessary to say any more in the warrant than that he had been wilfully insulted. As to the cause of the detention, we adopt the ground argued for the defendants, and think that we are not (unless it be absolutely necessary), to quash the warrant so as to make it absurd and nonsensical, but should do in holding that it assigns the detention of the party till the rising of the court, as a cause for the subsisting of the warrant. Both the objections taken against the warrant, therefore, fail, and our judgment must be for the defendants.

Judgment for the defendants.

COURT OF COMMON BENCH.

*November 23, 1850.**Re DEWS.*

Order to pay or be committed—Habeas corpus—Discharge of prisoner—Where a prisoner had been committed by order of the judge of the court for non-payment of a sum adjudged against him, and obtained a writ of habeas corpus, on the ground that the order was bad, as being made in the alternative to pay or go to prison, the court, on motion, ordered him to be discharged, proof being made of the rule upon the plaintiff in the suit and upon the officer of the court.

IN this case a writ of *habeas corpus* had been obtained to set up one Robert Dews, a prisoner, in order to his discharge. The prisoner had been summoned under the 98th section of 9 & 10 Geo. 4, c. 95, and an order issued by the judge of the County Court for Whitechapel, in the alternative, directing him to pay the debt, or, in default, to be committed to prison for thirty days. The prisoner, appearing in the custody of the officer of the prison, was ordered to stand forward whilst the clerk read the return to the writ.

Skinner now moved for the prisoner's discharge.—The order of commitment was clearly bad, being made in the alternative. The prisoner had been committed without an opportunity being afforded him of being heard in his defence, which is contrary to the provisions of the law. The affidavit now before the court states that the rule was served both upon the plaintiff and upon the officer of the court, and neither offers any opposition.

By the COURT.—Let the prisoner be discharged.

Prisoner discharged.

COURT OF EXCHEQUER.

November 22, 1850.

ROOM v. COTTAM.

Question—Affidavit—Averment of residence within twenty miles.

Affidavit in support of a motion for a suggestion stated, that plaintiff resided at Birmingham, and the defendant at West Bromwich, at the time of action brought, and it averred that the plaintiff did at that time reside within twenty miles of the defendant:

1st. That the averment of residence was insufficient, and that it should have stated "that the plaintiff did, at the time of action brought, reside within twenty miles of the defendant's residence."

That it is not sufficient to follow the words of the statute in reversing the exception in sect. 128 of the 9 & 10 Vict. c. 95.

THE COURT showed cause against a rule obtained by *Lush*, calling upon the plaintiff to show cause why a suggestion should not be ordered to deprive him of costs under the 128th section of 9 & 10 Vict. c. 95. In this case the affidavit is defective, as it does not sufficiently aver that the plaintiff's residence was, at the time of action brought, within twenty miles of the defendant's residence. The affidavit only states that the plaintiff lived at Birmingham and the defendant at West Bromwich, and that the plaintiff did, at the commencement of this suit, reside within twenty miles of the defendant. It is quite consistent with this statement that the defendant was on a visit within twenty miles of the plaintiff's residence. It has been laid down in numerous cases that it is not sufficient to follow the words of the statute, but it must clearly appear that the residences of the plaintiff and defendant were within twenty miles of each other at the time of action brought: (*Johnson v. Ward*, 6 D. & L. 420; *Duck v. Cox*, 1 Cox, Macrae, & Hertslet, 277; *Curvey v. Hickson*, 1 Max. & Pol. 364.) He was stopped by the Court.

Sh, contra.—There are also decisions to the contrary, and in cases precisely like the present, the Court of Common Pleas will not listen to this objection. It is laid down in *Butler v. Butler* (1 Cox, Macrae, & Hertslet, 141), that it is enough to follow the words of the statute. *Hayter v. Fish* (*Ibid.* 197,) also similar to this case, and there the court allowed the suggestion to be entered. *Peterson v. Davis* (*Ibid.* 148) is also an authority in favour. It is sufficient for the defendant to make out a *facie* case, and the plaintiff may traverse it.

KEE, B.—The plaintiff may have no means of knowing where the defendant dwelt. A man may have many debtors, of whose

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place of abode he is ignorant. I disagree with the reasons given for the decision in *Hayter v. Fish*, and the law laid down there has been overruled by the Court of Common Pleas. The statement in the affidavit should not always follow the exact words of the statute, but should state facts showing that the intention of the statute has been complied with. We ought to adhere to later decisions, according to which, as well as upon principle, the averment is insufficient.

ALDERSON, B.—I adhere to the opinion I delivered in the case of *Duck v. Barton*, where this point was expressly decided. I think, therefore, that the rule should be discharged.

PLATT, B. concurred.

Rule discharged with costs

COURT OF COMMON BENCH.

November 23, 1850.

NARDIN AND ANOTHER v. FAIRBANK.

Suggestion—Costs of setting aside judgment.

Action tried before sheriff, August 21; judgment signed August 23; defendant moved to enter a suggestion, November 5: it appearing that there had been no unnecessary delay on the part of the defendant, Held, that the plaintiff was not entitled to the costs of signing or setting aside the judgment.

ROXBURGH showed cause against a rule obtained in this case to enter a suggestion to deprive the plaintiff of costs under 9 & 10 Vict. c. 95, s. 128. The action was brought to recover the sum of 9l. 10s. The defendants pleaded, except as to 8l. 14s., not indebted, and as to 8l. 14s. a tender and payment of that sum in court. The jury found a verdict for the plaintiff on the first issue, damages 16s., and for the defendant on the plea of tender. The action was tried before the sheriff August 21st, and judgment was signed on the 23rd. The sheriff had no power to certify that this case was a fit one to be tried in a Superior Court. It follows, therefore, that the order to try before the sheriff should be in the proper form. The rule in this case is not the proper form. That is pointed out in the case of *Soames v. Cooper*, 3 Exch. 38. (a) They should have asked to set aside the

(a) See *ante*, p. 391, note (c).

, contra.—There is no case to show that the defendant is to pay the costs of the judgment. In the case of *Read v.*, the court refused the costs, on the ground that both were regular. Here judgment was signed two days after l, and the defendant had no opportunity to prevent the nt being signed.

ERSON, B.—The defendant might have taken out a summary stay proceedings, or give notice of his intention to move ggestion.

.—There was no judge at chambers at the time.

LOCK, C. B.—We are all of opinion the rule in this case be made absolute. It does not seem to us that the plaintiff ed to costs of signing judgment or of setting it aside, as ndant has made no default. He could not have applied to xceedings before judgment was signed.

ERSON, B.—We do not, by any means, decide, that if a as been guilty of any unnecessary delay, he will not have he costs of the judgment.

CE and PLATT, BB. concurred.

Rule absolute.

COURT OF EXCHEQUER.

December 6, 1850.

ELY v. MOULE AND ANOTHER.

Execution issuing without previous service of judgment.

*A debtor had been summoned by his creditor to the County Court, debt due, the debtor did not appear, the creditor did, and prove claim, whereupon the judge ordered the amount to be paid forth to the clerk of the court, at his office, between ten and four o'clock. At five o'clock on the same day, the amount not having been paid, levy was made, upon an execution issued, on such order :
Held, that the order to pay was a judgment ; that no previous service or other notice of it need be given, and that the amount not having been paid forthwith, as ordered, the execution and levy were perfectly regular.*

THIS was an action of trespass brought by the plaintiff against the defendants, for entering upon his premises and taking his goods. The defendant pleaded, first, not guilty. Secondly, that the goods were not the plaintiff's goods. Thirdly, that there was no notice of action given. And fourthly, a justification by defendant Moule, under an execution issued by the County Court in a plaint in which Moule was the plaintiff, and the now plaintiff was defendant. There was a similar plea of justification for the other defendant, the clerk of the County Court.

Replication admitting the matters of record stated in the plea, *injuria absque residuo causæ.*

The action was tried at the last Worcester Summer Assizes before Williams, J., when the following facts appeared.

The defendant, Moule, had brought an action against the plaintiff in the County Court ; the plaint having been entered on the 1st of July, 1849, the summons was to be heard on the 13th of August. Ely did not attend on that day, and in his absence a verbal order was made during office hours, that is, between ten and four o'clock, to pay forthwith the sum of 18*l.* 13*s.* 6*d.* debt, and 3*l.* 18*s.* costs. Tombs, the other defendant in this action, went to the plaintiff's house on the same day the order was made, after office hours, served the plaintiff with a copy of the order, and asked for payment. The order served was in the following form:

"In the County Court of Worcester, at Droitwich.

"(L. s.) Between John Moule, plaintiff,
and

"John Ely, defendant.

"Upon hearing this cause at a court holden at the Court Ho

ch, on the 13th day of August instant, it is adjudged that the plaintiff do recover against the said defendant the sum of £ 6*d.* for his debt, together with the costs of suit amounting in the sum of 3*l.* 18*s.* 6*d.* And it is ordered that the said defendant do pay the same to the clerk of the court at his office, at Droitwich, in the County of Worcester, on or before the 13th day of September, 1849. Given under the seal of the court the 13th day of August, 1849. By the court.

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“SAMUEL TOMBS, Clerk.

	£	s.	d.
“Debt -	18	13	6
“Costs -	3	18	6
“Payments -	0	1	8
	22	13	8

endurance at the office from ten till four o'clock.” The amount not having then been paid to him, he immediately levied upon the plaintiff’s goods, which took place about five in the afternoon of the same day, and is the trespass of which the plaintiff complained. At the trial it was contended, on the part of the plaintiff, that the execution was void, inasmuch as no order of the court ought to have been served before four o’clock on the day named in the order for payment to be made. The learned judge overruled the objection, and the first and second verdicts were found for the plaintiff, and the third and fourth for the defendant, so that the defendants had the verdict generally; a rule nisi having been obtained to set aside the verdict for the defendants, on the plea of justification fourthly, pleaded, and to enter it for the plaintiff, with 30*l.* damages.

Gray, Q. C., and *Gray*, now showed cause.—There was a verdict for the defendant; and that alone would be an answer to this application. The real point, however, in the case was, whether this order was an order merely as usually understood by that name, or is it not, in fact, the judgment, having all the incidents of a judgment attendant upon it as a judgment would have? If it is the judgment, it does not require service. The present plaintiff was duly summoned to appear, in the first instance, at the court, to answer the defendant Moule’s debt; he neglected to do so, and a default was made in his absence. The order was, that the debt be paid forthwith. It was not paid forthwith; and the execution was consequently made upon the execution, which issued that afternoon. The officer asked for the amount before he levied, and was refused a copy of the order; but this was an indulgence—he should have done so. It will be contended, on the other side, that the present plaintiff should have been summoned first to show why he should not pay the amount, or have been served with a writ of *habere facias*, and some reasonable time given him to pay. But it is not at all necessary under the act of Parliament. The *Vict. c. 95, s. 94*, enacts, “that whenever the judge shall make an order for the payment of money, the amount shall

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be recoverable, in case of default or failure of payment thereof forthwith, or at the time or times and in the manner thereof directed, by execution against the goods and chattels of the party against whom such order shall be made; and the clerk of the court, at the request of the party prosecuting such order, shall, under the seal of the court, a writ of *fi. fa.* as a warrant of execution to the high bailiff of the court, who, by such warrant, shall be empowered to levy, or cause to be levied, by distress and sale of the goods and chattels of such party, such sum of money as shall be so ordered, wheresoever they may be found within the district of the court, whether within liberties or without, and also the costs of the execution," &c. There is nothing even contemplated in the act to show that any notice, or previous service of the order, shall be given. Section 80 enacts, "that if on the day so named in the summons, or at any continuation or adjournment of the court cause in which the summons was issued, the defendant shall not appear, or sufficiently excuse his absence, or shall neglect to answer when called in court, the judge, upon due proof of service of the summons, may proceed to the hearing or trial of the cause on the part of the plaintiff only, and the judgment thereupon shall be as valid as if both parties had attended; provided always, that the judge in any such case, at the same or any subsequent court may set aside any judgment so given in the absence of the defendant, and the execution thereupon, and may grant a new trial of the cause upon such terms, if any, as to payment of costs, give security for debt or costs, or such other terms as he may think fit on sufficient cause shown to him for that purpose." The party summoned; he did not appear; if he had, this would have been good, and a person, therefore, who is summoned and does not appear, cannot be in a better position than one who does. *Wood v. Harvey* (6 East, 75), was a case somewhat similar; the 42 Geo. c. 90, s. 61, enables a magistrate to make an order for payment of a servant's wages in certain cases, and directs that, in case of refusal or nonpayment of any sum so ordered for twenty-one days after such determination, he may issue his warrant of distress; but it gives an appeal to the sessions. It was held that twenty-one days having elapsed between the making of such order before the appeal, and also twenty-one days after such appeal dismissed before the warrant of distress issued, the magistrate was not warranted in issuing such order of distress without proof of demand subsequent to the appeal. It is quite clear the judge has power to issue execution forthwith; the sum by the order is required to be paid forthwith, and there is no provision for service of any order made previously, therefore this is a good execution.

Keating (*Huddleston* with him), in support of the rule.—It was not contended for the plaintiff in this case that the judge might not order a debt to be paid forthwith; it is, however, submitted that under this County Court Act he may make the order which should express the way in which the sum sought to be recovered is to be paid, and that further it should allow of a possibility of costs.

with it. Suppose in this instance he had made it payable to the bailiff, it may have been good, and would have been sufficient as it was made to be paid forthwith, and it could only be the clerk at the office at Droitwich, between the hours of four o'clock, the plaintiff living some five miles distant, the levy was made at five o'clock in the afternoon, when, for the time, the plaintiff knew what the order was, it was quite possible he could comply with its terms, by paying the money at the time and place appointed, to the person named, the time elapsed, and the levy having been made, before the office closed the following day. Suppose an order had been made that the amount should be payable by instalments, how could a defendant comply with its terms without due notice or previous service of the order to enable him to do so? [PLATT, B.—The order is to pay forthwith; he was summoned, he should have been allowed to have heard its terms; is it not a limit of indulgence on the part of the court giving him until four o'clock, when the office closes, for him to do so?] It may be the order was made five minutes before four o'clock, if the costs had then to be taxed, how is he to know the time in order to pay in time? [MARTIN, B.—By being present and attending to his business himself. The order is to pay forthwith, and he was bound to pay immediately.] The inference to be drawn from the act is, that the order should be in conformity with the 78th section enables the judges of the superior courts to make rules regulating the forms of procedure in the County Courts, and they have given a form of judgment, No. 23: (see *Cox's County Court Practice*, p. 437.) [PARKE, B.—The County Court is a Court of Record, and this is a form of the record.] The order, in express terms, does not require the order to be served, yet it implies it should be first served, and this was contemplated, in Schedule D. to the act, there is a fee allowed for the service of the order. *R. v. The Justices of Lancashire* (8 B. & C. 593), *ibid. v. Stead* (a) (ib. 528), were referred to.

[J. B.—I am of opinion that the rule in this case ought to be discharged, and am glad I have been enabled to come to this conclusion. When the motion was made I had great reluctance in giving the rule nisi; but as all matters and points of law in these County Courts become now of considerable importance, it is very desirable to have them generally known and understood and defined; and as this was a rule of great importance, it was very fit it should be argued and well considered.

I am clearly of opinion that there was no occasion to discharge the alleged order; it is a part of the judgment that the defendant should pay forthwith; and as he was duly summoned, notice and ought to have been there. The 80th section of the act provides as to what proceedings shall be taken if the defendant in that case the collector had distrained for land tax under 38 Geo. 2, c. 5, ss. 9, 17. It is a demand upon the premises charged, at a time when the party liable to pay was at home, and immediately afterwards he distrained. The distress was held to be valid, that, before he distrained he was bound to allow a reasonable time to elapse after the demand, in order that the party liable might have an opportunity of complying.

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defendant does not appear when summoned, the judge can proceed to hear the cause on the part of the plaintiff only, and the judgment is to be as valid as if both parties had attended. This is, then, judgment of the court; and in this case it was to pay at once the constructive presence of the defendant; the service of a notice or order thereupon does not signify; the fallacy is, that judgment has been treated as a judge's order in its ordinary acceptance, but this is not so; it is a judgment, and all parties bound to take notice of the judgment of the court and its contents, and if the terms of it are not complied with, the party who is under the 94th section, have power to issue execution. In the present case the order was to pay forthwith. It is exactly the same, therefore, and it has the same effect, as if he were present. Now the judges, by the rules which they framed for the regulation of the proceedings of these courts, appear to have set out a bill in the form of a judgment; it is not annexed to the act, but is given by the judges, and properly enough, for it is quite possible that an order may be required to be served by the County Court judge, and varied, as he has the power to vary an order, or to specify particular terms that may be imposed; and such an order may require service, so that it was necessary the judges should have practicable, contemplate every possible contingency that may arise. This, perhaps, will explain the rules and forms as set out by the act, but this is here called an order, yet it is not so—it is a judgment. It has the same effect as a commitment. The party against whom it is made is bound by it, and without any previous notice or service, the order or proceeding of the court is in the nature of a judgment. It seems to me, therefore, that the proceedings were regular, and that this rule should be discharged.

ALDERSON, B.—I am of the same opinion. I entertain great respect for those who framed those rules with reference to the regulations of the proceedings of these courts; they, no doubt, acted upon the ground of meeting every possible case which might happen, and have so provided for it. Supposing a case had occurred by which it was necessary to draw up and serve any order, the judge may feel to be desirable, and they had not provided for it, they have done, it would have been a *casus omisus*. I entirely concur in the observations of my brother Parke—the order here is a judgment, and should have a similar effect to those in the Superior Courts.

PLATT, B.—I think there was no necessity to serve the order or judgment pronounced in this case previous to the levy being made, as it is not required by the act; indeed, it is very remarkable that, throughout the act, nothing whatever is said as to service of judgment, there is, however, as to service of summonses and other proceedings under the act, not so as to any judgment, and this clearly is a judgment; so also does it go on to say that service shall be made in reference to the different proceedings in ejectment; by the 106th section power is given to the judge to suspend execution in certain cases; but here the order was

sable to serve. Certainly this is not one ; it is the same as
ution directed to issue within a given period, which is very
one on a trial at Nisi Prius, but there it is not served.
s it necessary here ; it is the duty of the debtor always to
adiness to pay his creditor : it very seldom happens that
dship is found to arise, as creditors do not generally press
without sufficient cause, or notice and time given to the
to pay beforehand.

Rule discharged.

COURT OF QUEEN'S BENCH.

January 11, 1851.

WALTERS v. TURTON.

*recovery of small debts—What is—Prohibition—7 & 8 Vict.
c. 96, s. 68.*

*rior Court of Record, the jurisdiction of which is not limited as
ount, though it is as to locality, is not "a court for the recovery*

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—
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—
*Small Debts
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bition.*

1850, a plaint was commenced in the County Court of Derby at Derby, against John Turton, Tomlinson, and Wright, Thomas Walters, claiming 25*l.* for the value of the cart, harness, &c., and for damages and expenses. On December 1850, a summons, under 7 & 8 Vict. c. 96, s. 68, was obtained from the Borough Court of Record, at Derby, in the case *John Turton v. Jeremiah Walters*, directed to the parties and Thomas Walters, reciting the issue of the warrant of execution September 18, 1850, the levy by Tomlinson, and the claim by Thomas Walters, and requiring them severally to appear before the judge of the Court of Record at Derby, on January 15, 1851, in order that the claim might be adjudicated upon. December 15, the plaint in the County Court came on hearing, when the plaintiff, Thomas Walters, was nonsuited as John Turton, but obtained a verdict against Tomlinson and Wright for 5*l.*, and an order was made for execution on January 5, 1851.

Atherton now moved, on behalf of Tomlinson and Wright, for a rule calling on the plaintiff to show cause why a writ of prohibition should not issue to the judge of the County Court of Derbyshire, commanding him to proceed no further in the cause. The question is, whether the Borough Court of Record at Derby has jurisdiction for the recovery of small debts within 7 & 8 Vict. c. 96, s. 68, because, if so, proceedings have been taken which put an end to the jurisdiction of the County Court, and remit the case to the shape of an interpleader to the Borough Court of Record. Section 68 enacts "that if any claim shall be made to or in respect of any goods or chattels taken in execution under the process of any court for the recovery of small debts, or in respect of any goods or value thereof, by any landlord for rent, or by any person not being the party against whom such process has issued, it shall not be lawful for the clerk of the court out of which such execution issued, upon application of the officer charged with the execution of such process, either before or after any action brought against such officer, to issue a summons, calling before the court, out of which such execution issued, both the parties issuing such process and the party making such claim, and thereupon, any action which shall have been brought in any of Her Majesty's Superior Courts at Westminster, in the Court of Common Pleas at Lancaster, or in any local or inferior court, in respect of any such claim, shall be stayed, and the court in which such action shall have been brought, or any judge thereof, on proof of the issue of such summons, and that the goods and chattels were so taken in execution may order the party bringing such action to pay the costs of the proceedings had upon such action, after the issue of such summons, and the judge of the Court for the Recovery of Small Debts, out of which such execution issued, shall adjudicate upon such claim, and make such order between the parties in respect thereof, as of the costs of the proceedings, as to him shall seem fit," &c.

r the Borough Court of Record at Derby appears, by the avit of the Registrar, to be a court which has a jurisdiction recovery of debts unlimited in point of amount, but of course ted as to locality; and which is generally resorted to for the very of small debts only. This, therefore, is a court within meaning of sect. 68. Sect. 1 of 8 & 9 Vict. c. 127, impliedly ribes an inferior court of record for the recovery of debts as a t for the recovery of small debts. He also referred to the title & 10 Vict. c. 95, (a) and 12 & 13 Vict. c. 101. (b)

ORD CAMPBELL, C. J.—But it is clear that the Borough rt of Record at Derby is not a court for the recovery of small s within 7 & 8 Vict. c. 96. It is quite clear that the meaning e Legislature was to confine it to courts of limited jurisdiction. ATTESON, J.—A court for the recovery of small debts is a t for the recovery of small debts only. Now it does not ar that there is any limit here as to amount, though I ame there is to locality.

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Rule refused.

9 & 10 Vict. c. 95, "An Act for the more Easy Recovery of Small Debts and Demands land."

12 & 13 Vict. c. 101, An Act to Amend the above-named act, and to Abolish certain Courts of Record.

COURT OF COMMON BENCH.

November 11, 1850.

ABDEY v. DALE.

Order in the alternative to pay or be committed under 9 & 10 Vic ss. 98, 99, 100.

The judge of a County Court made an order on a defendant to debt, adjudged against him, by instalments, "or" that he be committed to prison. The defendant made default, and thereupon a writ was issued for his commitment.

Held, that the defendant had a right to be heard in his defence; committal; and that an order for his imprisonment, on default of payment, embodied in an order to pay by instalments, was bad.

THIS was an action of trespass for assault and false imprisonment. The declaration stated that the defendant on the 20th day of August, A.D. 1849, with force and arms assaulted the plaintiff, and seized him and caused him to be arrested and apprehended and unlawfully committed to a certain common or prison, called the House of Correction for the County of Middlesex, and also there imprisoned the plaintiff, and kept him detained in prison there, without any reasonable or proper cause, for a long space of time, to wit, for the space of many days then next following, contrary to law, &c., whereby, &c.

The material plea was the second, which stated that at the said time when, &c., in the declaration mentioned, to wit, the 1st day of June, A.D., 1847, the now defendant, at the instance of George Cornelius Dale, according to the form of the statute that behalf, levied their plaint in the Whitechapel County of Middlesex against the now plaintiff for the recovery of a debt, to wit, 13*l.* 3*s.*, then and within the jurisdiction of the said court, justly due and owing from the now plaintiff to the defendant and the said G. C. Dale, which said court the said court thence, and continually during the times hereinafter in the declaration mentioned, was holden within the district of the said Court, James Manning, one of Her Majesty's Serjeants-at-law, then and during all that time being the judge of the said court, which said court then and during all that time had jurisdiction to hear and determine the said plaint, and the now plaintiff who the said court was liable to be sued in the said court for the said debt was the said plaintiff, to wit, on the day and year last aforesaid, duly summoned to appear in the said plaint. And further, that the now plaintiff afterwards

(a) See *Ex parte Kinning* (ante, pp. 1 and 16), and *Kinning v. Buchanan* (ante, p.

fore the said time when, &c., to wit, on the 10th day of June, the year last aforesaid, appeared in the said court so holden as aforesaid, to answer the said plaint, and such proceedings were thereupon had in the said plaint that afterwards and before the said time when, &c., to wit, on the day and year last aforesaid the now defendant and the said G. C. Dale, by the consideration and judgment of the said court, recovered against the now plaintiff as all the said debt amounting to the said sum of 13*l.* 3*s.*, as also the said sum of 2*l.* 7*s.* for costs and charges of the now defendant and the said G. C. Dale, by them about their suit in that behalf pending by the said court then adjudged to them in that behalf; such said two several sums of 13*l.* 3*s.* and 2*l.* 7*s.*, amounting in the whole to a large sum, to wit, the sum of 15*l.* 10*s.*, were then ordered by the said court in due manner, according to the statute in that behalf, to be paid by the now plaintiff to the now defendant and the said G. C. Dale, by certain monthly instalments, that is to wit, by instalments of 15*s.* every month, the first of such instalments to be paid on the 10th day of July then next, such payment to be made at the office of the clerk of the said court, as by the record of the proceedings in the said plaint still remaining in the said court more fully appears. And further, that the now plaintiff on divers days afterwards and before the issuing of the summons hereinafter mentioned paid divers small sums of money, amounting in the whole to the sum of 2*l.* 7*s.* 4*d.*, and no more, for and towards payment of the said instalments, but that the now plaintiff made default in payment of the residue of the instalments, although at the time of the issuing of the said summons hereinafter mentioned, the whole of the said instalments did become due and payable, and that 12*l.* 12*s.* 8*d.*, parcel of the said sum of 15*l.* 10*s.* at the time of the issuing of the said summons hereinafter mentioned, and of the making of the order and of the committal hereinafter also mentioned, remained and was wholly due and unpaid and unsatisfied to the now defendant and the said G. C. Dale. And further, that the said sum of 12*l.* 12*s.* 8*d.* so remaining due and unpaid, and the said judgment being and remaining unsatisfied, afterwards and before the said time when, to wit, on the 20th day of May 1849, the now defendant and the said G. C. Dale, according to the course of practice and rules of the said court and the form of the said statute, caused the now plaintiff to be summoned, and the now plaintiff then was summoned to appear at the said county court, to wit, at the court house in Abchurch-lane, Whitechapel, on the 31st day of May, A.D., 1849, to answer such questions as should be put to him touching his the plaintiff's estate and effects, and the manner and circumstances under which he the now plaintiff contracted the said debt which was the subject of the suit in which the said judgment was so obtained as aforesaid, and as to the means and expectations which the now plaintiff had at the time of contracting the said debt, and as to the property and means he then still had of discharging the said debt, and as to the disposal he might have made of any property;

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ANDREWS DALE. and the now defendant avers that the said several things to which the now plaintiff was so summoned to answer sections as should be put to him was named in the said summons and that the said summons, to wit on the 30th day of May year last aforesaid, was in due manner served upon the now plaintiff personally, he the now plaintiff then dwelling within the limits of the said court. And further, that afterwards and before the time when, &c., to wit on the said 31st day of May, A.D. 1850. at the said county court before the said judge, the now plaintiff appeared in answer to the said summons pursuant to the effect thereof, and was then examined touching his estate and effect of the manner and circumstances under which he contracted the said debt, and as to his means and expectations which he had at the time of the contracting of the said debt, and as to the proper means he then still had of defraying the said debt, and of the disposal he might have made of any property; and then appeared to the satisfaction of the said judge of the said court, and it was then adjudged by the said court upon the said declaration, that the now plaintiff had sufficient means and a sufficient ability of discharging the said sum of 12*l.* 12*s.* 8*d.* when the same was due under the said order, and that he still had sufficient means and ability of discharging the same. And it was thereupon the said court, adjudged and ordered by the said court that the now plaintiff should pay the sum of 12*l.* 12*s.* 8*d.*, together with 1*l.* for the costs of the last-mentioned summons and the proceedings thereon, according to the statute in that behalf, amounting in whole to the sum of 14*l.* 6*s.* 4*d.*, by instalments of 10*s.* per month, the first instalment to be paid on the 2nd day of June next, or that the now plaintiff be committed for the term of 14 days to the house of correction for the county of Middlesex, in Coldbath Fields, in the said county, according to the form of the statute in such case made and provided, or until he be discharged by due course of law, as by the last-mentioned order remains. And the said court, reference being thereto had, will fully and effectually execute the said order. And further, that afterwards, and before this time, when the declaration mentioned, to wit, on the 2nd day of August, A.D. 1850. the year last aforesaid, two of the last-mentioned instalments became due and in arrear, but the now plaintiff wholly neglected and refused to pay the same or any part thereof, whereupon the said sum of 14*l.* 6*s.* 4*d.*, and every part thereof, still remained wholly due and unpaid. And afterwards, and before the time when, &c., to wit, on the 17th day of August, in the year last aforesaid, the now defendant and the said G. C. Dale, caused to be and prosecuted out of the said County Court then holden by the said judge within the district of the said court, and thereupon in due form of law issued by the said court, according to the effect of the statute in such case made and provided, a certain writ of *habere facias* writing under the seal of the said court, and bearing date the 17th day of August, year last aforesaid, and directed to the high bailiff or bailiffs of the said court, and all constables and peace

he jurisdiction of the said court, and to the governor of the house of correction aforesaid, whereby, after reciting the premises before mentioned, the said high bailiff, bailiffs and constables and peace officers, were required to take the now plaintiff, and deliver him to the governor of the said house of correction, and the said governor was thereby required to receive the now plaintiff, and him safely keep in the said house of correction for a term of twenty days from the arrest under that warrant, or until he should be sooner discharged by due course of law; which warrant afterwards, and before the said time when, &c., to the day and year last aforesaid, was delivered to Nathaniel Maule being one of the bailiffs of the said court, to be executed in due form of law, by virtue of which said warrant the said Nathaniel Maule Sykes, so being such bailiff as aforesaid, afterwards, to the 2nd of August, in the year last aforesaid, within the jurisdiction of the said court, in execution of the said warrant, laid his hand upon the now plaintiff, in order to arrest him for the cause aforesaid, and did then and there arrest him for the cause aforesaid, and did then and there deliver him to the said governor of the said house of correction, who did then keep and detain the now plaintiff in custody under the said warrant, for the term of twenty days from the said arrest, which are the same trespasses whereof the plaintiff hath above complained against the defendant.—Verification.—To this plea there was a demurrer.

in support of the demurrer.—The substantial objection to the plea is, that the judge of the County Court had no authority to make an order on the present plaintiff in the alternative to pay the fine or go to prison. Neither could he commit the plaintiff without issuing a summons calling upon him to show cause why he should not be committed. [MAULE, J.—That was decided already in this court.] Yes; it was decided in *Kinning* (1 Cox, Macrae, and Hertslet, 16.) The difference between that and the present case is very slight; indeed, it appears that every word of Mr. Justice Maule's judgment in *Ex parte Kinning* will apply to the present case. (b) There is no material difference between them. The little difference that does exist is immaterial by the grounds of the decision, which are, that contrary to the policy of the law that a subject shall be tried without an opportunity of being heard in his own defence.

It is obvious the order to pay or go to prison violates the principle. A second time in this court has that principle been affirmed: (*Kinning v. Buchanan*, 1 Cox, Macr. & Hertslet, 375.) On the other hand, if the order be good, the judge has not the authority of deciding whether plaintiff has made default, so as to be liable to commitment. [MAULE, J., referred to *Capel v. Cr. & Jer.* 558), and *Dr. Bentley's case* (1 Str. 567), as being in violation of a subject's right to be heard in his own defence.]

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(b) See ante, p. 20.

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Hugh Hill, contra.—The case of *Ex parte Kinning* is altogether different from the present, and forms no authority for saying the judgment here should be for the plaintiff. There the case was only once before the judge who made an order that he pay on a certain day or be committed, and on failing to pay the first instalment the debtor was committed. No subsequent summons was issued nor any notice given. Here the case is different. The now plaintiff (the defendant in the County Court) was summoned for a debt; he appeared, and was ordered to pay the debt by instalments. Default of payment having been proved, a summons was taken out pursuant to 9 & 10 Vict. c. 95, when he appeared and was examined respecting his means and the circumstances under which he incurred the debt. By sect. 99, the judge has power to commit if the defendant's answer is unsatisfactory at the hearing of the judgment summons, and was committed accordingly. No power is given by the 100th section, or any other, to summon the debtor a second time before the judge. [MAULE, J. (referring to the power by sect. 100 to the judge of the County Court to rescind or vary any order),—surely a party stands in the same relation to the court at the second appearance as when the first order was made?—] so. There is a power given to summon the defendant before the judge and to make searching inquiries as to the defendant's conduct, but no power is given by the statute to compel the defendant to come before the judge in order that he may be personally interrogated. And there is good reason for this, inasmuch as the rules of the County Court, requiring all payments made into court, must always be taken as having judicial notice of what payments are made, and consequently when default in making all payments being made to the clerk of the court. [MAULE, J.—It seems to me plain enough that the act says the debtor must pay, or in default be committed. The ground on which the *Kinning* case was decided in this court was, that circumstances had occurred before the expiration of the time for payment, disabling the party to pay, and that he ought, therefore, to have an opportunity of going to be heard before he is committed.] In the *Kinning* case there was no judgment summons. [MAULE, J.—The common law principle, which says no man shall be punished without opportunity of being heard, comes in whether the statute has express attention to the matter or not.] There is a case in the Exchequer, under the Tithe Commutation Act, which should have the attention of the court: (*Re The Hammersmith Rent-charge*, 4 Exch. 87.) The question there was, whether an order could be made *ex parte*, and the court held it might be done if it appeared that such was the intention of the Legislature. The usual practice is to make an order for the committal of the party which is made in the office and issued if the instalments be not paid. The effect of this order is such, that nothing could excuse the defendant if he made default. The only ground on which I leave the case to the court is, that the defendant has no means of relief.

Lush was not called upon to reply.

JERVIS, C. J.—It seems to me that the court is bound by the authority in *Ex parte Kinning*, and therefore the plaintiff is entitled to judgment. Though the facts are not precisely the same in that case as in this, the judgment there rests on the broad and general principle that a party shall not be committed without an opportunity of first being heard in his own defence, and I see nothing in this statute calculated to take that right away. The 99th section of the statute gives power of committal in any one of seven cases, and the last is—"If it shall appear to the satisfaction of the judge that the party summoned has then, or has had since the judgment obtained against him, sufficient means to pay the debt, either together or by instalments, which the court shall have ordered; and if he shall refuse or neglect to pay the same as shall have been ordered, it shall be lawful for such judge," &c. If the party appears and refuses to pay according to the order, the judge has at the same time power to commit. The provisions and directions of the statute are not inconsistent with the common law rule already referred to, and there is no necessity for straining the section beyond its strict meaning, so as to uphold this plea and extend the power of the judges. This case, then, being altogether consistent with the principle on which this court acted in *Ex parte Kinning*, the court will follow that case, and judgment must be given for the plaintiff.

MAULE, J.—I agree with the Lord Chief Justice. It is not necessary I should go through the whole case. I suggested, in the course of the argument, all the objections that occurred to me, saying that if they could be met they would be well answered by Mr. Hill. It is enough here to go on the general principle of law laid down by the Chief Justice. No doubt an act of Parliament might override that principle; but so long as nothing expressly to that effect is enacted, the court must follow the dictates of natural justice.

WILLIAMS, J.—I am of the same opinion. I was not one of the judges who decided the case of *Ex parte Kinning*, but on review of that case I fully concur in the judgment of the court on it.

TALFOURD, J.—I am of the same opinion.

Judgment for the plaintiff.

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COURT OF EXCHEQUER.

January 24 and 31, and February 7, 1851.

POWER v. JONES.

Affidavit—13 & 14 Vict. c. 61, ss. 11, 13—*Costs*—*Reg. Gen. Term*, 1 Vict.

In an action of debt in a Superior Court, the defendant paid into the sum of 12l. 13s. 3d., and the plaintiff took out that sum in satisfaction of his claim, and entered a nolle prosequi as to the residue causes of action: he then applied to a judge at chambers under 13th section of the 13 & 14 Vict. c. 61, and obtained an order for costs on the statement of the attorney's clerk, unsupported by affidavit. On an application to the court for a rule to rescind such order appearing by the affidavits that any objection was made to the order at chambers entertaining the case, the court refused the rule.

A rule having been subsequently granted on amended affidavits, Held, that the 13th section of the County Courts Extension Act, gives power to a judge to make an order for the plaintiff to have costs in certain cases was not applicable to the above case; but the plaintiff was entitled to his costs under Reg. Gen. Trin. 1 Vict.

MACNAMARA moved for a rule, calling on plaintiff to show cause why an order made by Platt, B., should not be rescinded, and why the sum of 5l. 18s. 8d. paid under protest, should not be returned to the defendant. The order was made on 2nd of last January for the plaintiff to have the costs under County Court Extension Act, 13 & 14 Vict. c. 61.

The action was in debt. The defendant pleaded as to 12l. 11s. payment into court, and, as to the residue, never indebted. The plaintiff took out of court the sum so paid in, and entered a nolle prosequi as to the residue of the causes of action. He then recovered less than 20l. in an action *ex contractu*, and, in order to have costs, it became necessary for him to apply for them under 13 & 14 Vict. c. 61, ss. 11, 13. It was contended that the effect of this statute is to shift the onus from the defendant to the plaintiff, who must now show his title to costs, instead of the defendant having to show that the plaintiff ought to be deprived of them. The plaintiff issued a summons under the act, but at the hearing he did not produce any affidavit, nor did he show, by affidavit or otherwise, that he came within the exceptions of the statute. On the other hand affidavits are now produced to the effect that he did not come within such exceptions. The learned judge, it appears,

le the order upon the ground that the plaintiff is deprived of s only in cases where the sum recovered is recovered *by verdict*. the COURT.—It does not appear that any objection was made re the judge on the ground that no affidavit was produced by plaintiff.] Cause was shown against the summons, and the tiff ought now to make out his title to costs with as much tness as was observed towards the defendant when he sought nter a suggestion under 9 & 10 Vict. c. 95, to deprive the tiff of costs. The mere statement of an attorney's clerk ot be sufficient to show that a party comes within the concur- clause of the former act or the exceptions of the latter one.

ARKE, B.—It would add to the expense of hearing matters at nbers if affidavits were, in all cases, required, and it is the ct of these statutes to afford cheap and speedy remedies. As : affidavit does not show that any objection was made at the ing to the judge entertaining the case without affidavits, you ot entitled to a rule.

n a subsequent day, the court granted a rule *nisi* on amended avits. Cause to be shown at chambers on the 7th of February. *Montague Smith* now showed cause accordingly. The ques- is, whether the words "recover a sum not exceeding 20*l*." in 11th section of the County Court Extension Act apply to a case re the sum of money has been paid into court, and taken out tisfaction? By Reg. Gen. Trinity Term, 1 Vict., the plaintiff, the delivery of a plea of payment of money into court, is at ty to reply to the same by accepting the sum so paid into t in full satisfaction and discharge of the cause of action, in act of which it has been paid in; and he is at liberty in that to tax his costs of suit; and in case of nonpayment thereof in forty-eight hours to sign judgment for his costs of suit so d. That rule has the force of an act of Parliament, and is not aled by the County Court Acts. The judgment in such a is for the *costs*, not for the debt, and it is only when the debt vered, that is recovered by judgment, does not exceed 20*l*., the plaintiff is to be deprived of costs. *Brooks v. Rigby* (2 t E. 21), is in point. There the plaintiff had arrested the ndant for an alleged debt of 20*l*., and declared against him in *ex parte* for goods sold, &c., adding a particular of demand to the unt of 20*l*. The defendant paid 12*l*. into court and pleaded payment according to Reg. Gen. Hil. 4 Will. 4, averring that plaintiff had sustained no further damage. The plaintiff took money out of court, and a motion was made on behalf of the ndant for costs under 43 Geo. 3, c. 46, s. 3, whereby the ndant is entitled to costs in all actions where the plaintiff shall *recover* the amount of the sum for which the defendant shall e been arrested and held to special bail: but the Court refused nd Taunton, J., said, "the plaintiff does not *recover* the sum in, for the rule only enables him, on accepting it, to sign judg- t for the costs." A similar case is that of *Rowe v. Rhodes* r. & M. 379.) In *Reed v. Shrubsole* (1 Cox, Macrae, & Hertslet,

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226), the County Court Act was held not to apply to judgment by default. The plaintiff was therefore, in this case, entitled to his costs.

Macnamara, in support of the rule.—The order is clear. By sect. 13 of 13 & 14 Vict. c. 61, the plaintiff is bound to satisfy the judge that the action was brought in a court of concurrent jurisdiction was given to the County Courts by 9 & 10 Vict. c. 95, s. 128, or for which no plaint have been entered in a County Court, or that the cause was removed from a County Court by *certiorari*. And this is bound to do, whether there was a verdict in the action. The plaintiff did not show that he came within any one of the requirements, but had merely urged when before the judge the hearing on the order, that the case was analogous to where judgment by default had been suffered, which is excepted out of the Extension Act by the 11th section. *Shrubsole* was decided under the first County Court Act, but the words were—"and a verdict shall be found for less than 20*l.* (sect. 129); judgment by default, therefore, was not within the rule. The other cases cited for the plaintiff proceeded upon a different statute, and were applicable to a different state of circumstances. The rule (Trinity Term, 1 Vict.) giving the plaintiff judgment if the sum out does not exceed 20*l.* The word "recover" means "obtain," and it is immaterial whether it be by verdict or otherwise. The money was paid under the order, and therefore should be returned if the order be rescinded.

PLATT, B.—The order in this case must be rescinded, it was unnecessary, inasmuch as I am of opinion that the plaintiff was entitled to his costs under the rule, independently of the statute. But as the costs were taxed before the order was made, I shall not direct them to be returned; and the defendant substantially failed, this rule must be discharged with costs.

Rule discharged with costs.

(a) *Tarrant v. Moryan* (2 C. M. & R. 252) was a case where the defendant paid 1*l.* 18*s.* into court in satisfaction of the cause of action, and the plaintiff was ordered to pay the costs. It was then held that the defendant was not entitled to a verdict, and that the plaintiff was entitled to his costs, on the ground that the action was brought to recover more than 40*s.*, and ought therefore to have been brought in the County Court. (*Richards v. Bluck*, 6 C. B. 443, Rep.)

COURT OF COMMON PLEAS.

*Michaelmas Term, 1850.**Re H. HAWKSBEЕ.**Jurisdiction—Commitment—Judgment.*

Defendant had been committed, under sect. 95, for nonpayment of a debt, according to the order of the court. The judgment was dated July 12, 1848, and the order for commitment was not made until November 12, 1850. The judgment had not been revived by sci. fa. or otherwise.

Motion for habeas corpus to bring up the prisoner to be discharged on this ground, the court refused the rule.

Objection, a judgment after a year and a day is voidable only, and not void:

Are, if it be necessary to revive a judgment in the County Court?

PEARSON applied for a *habeas corpus* to bring up the body of Henry Hawksbee, a prisoner, who had been committed by a judge of a County Court, under the 99th section of the 8 & 9 c. 95, for nonpayment of a debt adjudged against him. The date of the judgment was July 12, 1848, and the order for commitment under the section above referred to was not made till the 12th of November in the present year. It was contended that there was no judgment to warrant the commitment, inasmuch as the judgment was more than a year old, and there had been no revival by *scire facias* or otherwise. [JERVIS, C. J.—Is there any instance where it was held that a *sci. fa.* was necessary to revive a judgment where there is no judgment roll?] It is laid down in Bacon's Abridgment, and the text-books of practice, that after the lapse of a year and a day a judgment must be revived in this case: (Bacon's Abridgment, tit. "Execution.") The debt is payable by instalments and default made. [MAULE, J.—When was the last instalment paid?] More than a year and a day before the date of the order for commitment. There ought, previous to this commitment, to have been some method followed by which the judgment would be revived. This was not the case; therefore, as there are distinct authorities showing that the law presumes a judgment to have been satisfied after a year and a day, the court will assume this judgment to be so, and that the judge of the County Court had no jurisdiction in the matter when he made the order for the applicant's imprisonment: (Comyn's Dig. tit. "Execution," F. 4, citing 4 Levinz, and 2 Lutw.) [WILLIAMS, J.—I thought it had been solemnly decided that a judg-

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ment after a year and a day was voidable and not void. JERVIS, C. J.—The case of *Patrick v. Johnson* (3 Levinz), is an authority direct against you; it was there held that an execution without *sci. fa.* after a year and a day is voidable and not void. MAULE, J. referred to Chitty's Archbold (1013), where the authorities are collected.] As no provisions have been made in the County Courts Act for reviving a judgment, it is submitted that the common law rule prevails; this being so, the committal was irregular and the prisoner should be brought up for his discharge. [MAULE, J.—If the proceedings are irregular, you can move to set them aside.]

By the COURT.—This rule cannot be granted; but the court expresses no further opinion than that a judgment under such circumstances is voidable; it is not void.

Rule refused.

JUDGES' CHAMBERS.

December 14, 1850.

(Before PLATT, B.)

JONES v. HOLDSWORTH AND ANOTHER.

County Court—Certiorari—Construction of 13 & 14 Vict.
c. 61, s. 16—Costs.

Sect. 16 of the County Court Extension Act enacts, "that no judgment, order, or determination given or made by any judge of a County Court, nor any cause or matter brought before him, or pending in this court, shall be removed by appeal, motion, writ of error, certiorari, or otherwise, into any other court whatever, save and except in the manner and according to the provisions hereinbefore mentioned." And sect. 1 of the same act enacts that this and the General County Courts Act shall be construed as one:

Held, that the first-mentioned section is to be construed with reference to sect. 90 of 9 & 10 Vict. c. 95, and that the certiorari is not thereby taken away or limited to cases within the former jurisdiction.

IN this case a plaint had been entered in the County Court of Carnarvonshire, to recover 50*l.* as damages, for not supplying a cargo of slates according to agreement. The defendants applied to Martin B., for a *certiorari* to remove the proceedings into the Court of Exchequer, which was granted.

Morgan Lloyd now appeared in support of a summons for a *procedendo*.—I meant to contend, in support of this application.

the *certiorari* has been taken away in all cases above 20*l.* by 6 of the Extension Act, and that the construction of sects. 15, and 16, taken together, is that the appeal thereby given tended to be the only means of removing a plaint for a cause on above 20*l.* from the County Court; but since I have been into this room, I have been informed by an eminent counsel that Mr. Baron Parke has, two days ago, decided that the *certiorari* has been taken away by the section in question; and as I have been informed that the question was fully argued by counsel before Mr. Baron Parke, and that he took time to consider his judgment, it would be unwise in me to press the point further.

Mr. Serjeant, for the defendant, then applied for costs, and said that the plaintiff could not be forced to proceed with the action, nor, if *prossed*, the defendant could not in any event obtain his costs unless the judge granted them now.

Mr. Serjeant Lloyd, contra.—This was a proper question to be raised, and I could not know of Mr. Baron Parke's decision, given only two days ago, except by accident. The question was, whether 16 of the Extension Act referred to the previous two sections of that act, or to sect. 90 of the former act. It was not as clear whether the two are to be construed as one or not, which is peculiarly clear.

Mr. Serjeant B.—This was a proper question to be raised, and the result must be costs in the cause.

Summons dismissed without costs.

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Sittings at Westminster in Hilary Term, 1851.

January 16.

(Before Mr. JUSTICE TALFOURD.)

OSMOND v. BONE.

Set-off—Costs—Certificate—13 & 14 Vict. c. 61.

*The plaintiff's debt is reduced below 20*l.* by set-off, the court at law will grant a certificate to empower the plaintiff to receive costs.*

It was an action in *assumpsit* to recover 48*l.* as money had and received. The defendant pleaded a set-off as to 35*l.*, and to the residue *non assumpsit*.

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c. 61.

The jury found a verdict for the plaintiff on the general issue, and for the defendant on the plea of set-off. Verdict, 13*l*.

M' Oubrey, for the plaintiff, applied for a certificate under 13 & 14 Vict. c. 61, ss. 11 and 13, to entitle the plaintiff to costs. TALFOURD, J.—This is not a fit case for a certificate.

M' Oubrey.—It is a case in which the original County Court Act does not apply. At all events, the plaintiff is entitled to sue in the Superior Court, though a set-off may be capable of proof against him: (*Woodhams v. Newman*, 1 Cox & Mac. 231.) But in any case of *assumpsit* where the plaintiff recovers an amount not exceeding 20*l*., he can recover no costs (by 13 & 14 Vict. c. 61, s. 11) unless he obtains a certificate under sects. 12 or 13. The ground of the application here is under sect. 13, that this action "was brought for a cause in which concurrent jurisdiction is given to the Superior Courts" by 9 & 10 Vict. c. 95.

TALFOURD, J., granted the certificate.

NOTE.—*Quære*, whether the judge at Nisi Prius had any jurisdiction under sect. 12. *Semble*, on the authority of *Bewick v. Capper* (1 Cox & Mac. 243), he had jurisdiction under sect. 12.—REPORTER.

COURT OF QUEEN'S BENCH.

Hilary Term, 1851.

WOODCOCK v. PRITCHARD AND ANOTHER.

Execution—Landlord's claim—Wearing apparel—Implements of Trade—Bailiffs.

Sect. 96 of the County Courts Act protects wearing apparel and implements of trade from seizure under an execution issued from the County Courts.

But where the landlord gave to the bailiff a notice in writing under sect. 107, claiming arrears of rent, the bailiff may distrain such wearing apparel and implements of trade, in order to satisfy the rent claimed.

THIS was an action of trespass.—The declaration stated that the defendants, on the 11th of September, 1849, seized certain goods, to wit, a bedstead, sign-board, pillows, &c., of the value of 5*l*., the same being the bedding of the plaintiff and his family, and the implements of his trade, and converted and disposed of the same, &c.

The defendants pleaded, 1st, not guilty; 2ndly, that the goods were not the goods of the plaintiff; 3rdly, that the goods were seized after the passing of the County Courts Act, and under that Act, and that no notice of action was given; 4thly, that before the seizure of the goods a plaint was levied by one Steward against Woodcock (the plaintiff) in the Whitechapel County Court for the sum of 1*l.* 19*s.*; that Steward recovered judgment for that sum and costs; that the sum recovered was ordered by that Court to be paid at the rate of 8*s.* per month; that Woodcock did not pay according to the order of the court, whereupon, after default made, the clerk of the court, at the request of Steward, issued a *fi. fa.* a warrant of execution directed to the bailiffs of the said court, with power to make and levy the amount upon the goods of the plaintiff, except the wearing apparel and bedding of the plaintiff and his family, and the tools and implements of his trade, if any, the value of 5*l.*; that he had no goods in the Whitechapel district, whereupon a warrant issued into the district of Lambeth County Court, and was there executed; and under the said warrant the goods and chattels of the plaintiff found in his apartments were seized, for the purpose of levying the moneys so directed to be levied by the warrant of execution; that the landlady of the tenements gave notice to the bailiffs of her claim for 14*s.* as arrears of rent; and that they distrained as well the amount of the debt and costs under the writ, and took the goods in declaration mentioned, as a distress (specifying the goods actually as they were specified in the declaration) for rent, and afterwards sold the same, as they were not replevied. The plaintiff took issue on the other pleas, and demurred to the last. The question raised on this demurrer was, whether a bailiff executing process of a County Court for debt and costs, and on whom notice of a claim for rent by a landlord is served, can make a general levy on the bedding and implements of the trade of the debtor under the value of 5*l.*, paying thereout the rent owing by the debtor to his landlord. The 96th section of the County Courts Act (9 & 10 Vict. c. 95), provides "that every bailiff executing process issuing out of the County Court against the goods and chattels of any person, may, by virtue thereof, seize any goods and chattels of such person, except the wearing apparel and bedding of such person and his family, and the tools and instruments of his trade to the value of 5*l.*, which shall to that extent be protected from seizure." The 107th section authorizes the landlord, by any writing under his hand, or the hand of his agent, to deliver to the officer making the levy (the writing stating the terms of the holding and the rent payable for the same) to claim the rent then due to him, not exceeding the rent of four weeks, where the tenement is let by the week; and in case of the claim being so made, the officer making the levy shall distrain as well for the amount of the rent so claimed and the costs of such additional distress as for the amount of money and costs for which the warrant of execution issued under this act, and the costs of the sale.

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The case was argued before Patteson, Coleridge, Wig and Erle, JJ.

Hake, in support of the demurrer.—Can the execution and the bailiff of the County Court compel the landlord the debtor's wearing apparel and implements of trade? Was the intention of the statute to give them any such power?

not. Sect. 96 expressly protects those articles from seizure on an execution; and when sect. 107 gives power to the bailiff to distrain for the landlord's rent, the subject matter of the distress is confined to the goods liable to be taken in execution; and it excludes the implements of trade and wearing apparel.

RIDGE, J.—But the tenant may replevy the goods seized on distress for the rent; and he cannot replevy those taken in execution.] Both are in the nature of an execution, as appears from the use of the words "additional distress." If that were the case, the greatest confusion would follow; because all the other provisions of the act relating to the sale and appraisement of goods expressly apply to goods "taken in execution."

RIDGE, J.—The law had already provided for goods distrained on for rent. Then there must be one appraisement under sect. 106 of the County Courts Act, of goods taken in execution, and another appraisement under the statute of Anne, of goods distrained on for rent. [WIGHTMAN, J.—If the tenant replevied, the bailiff must return the excepted articles, and sell the others. COLERIDGE, J.—How does the tenant suffer? If the landlord came in person, he might take the exempted articles. The officer becomes the bailiff of the landlord for one purpose, but he is the officer of the court for the other.] The statute 13 & 14 Vict. c. 61 requires the landlord to be paid out of the moneys raised on the execution. [WIGHTMAN, J.—But that statute passed after the seizure took place, and is not retrospective.] *Palgrave v. W* 1 Stra. 214, was referred to.

Hannen, contra, was not called upon.

COLERIDGE, J.—We are all of opinion that the plea fails for the reasons indicated during the argument.

Judgment for defence.

COURT OF QUEEN'S BENCH.

January 11 and January 13, 1851.

DE PORQUET v. BURY.

County Court—Suggestion—Cause of action.

Goods were ordered by defendant at the plaintiff's shop to be sent by railway to the defendant's residence. The goods were delivered at the railway, and by the railway company conveyed to the defendant. Neither the plaintiff's shop nor the railway station were within the A. district of the County Court, within which the defendant's residence was situated:

held, that the cause of action did not arise in any material point within the district A.

IN this case a suggestion had been entered upon the roll under stat. 9 & 10 Vict. c. 95, ss. 128, 129, which had been traversed. The issue raised thereon came on for trial before Lord Campbell, C. J., at the sittings in London after Michaelmas Term 1850, when a verdict was entered for the plaintiff, leave being reserved to the defendant to move to set aside the verdict and to enter it for himself.

Parnell moved accordingly to enter the verdict for the defendant, or for a new trial upon affidavits. Upon the latter point the rule was refused. Upon the former, he cited *Coates v. Chaplin*, Q. B. 483.

The facts appear from the judgment.

Cur. adv. vult.

LORD CAMPBELL delivered the judgment of the court.—We have considered this case in which a motion was made on Saturday, the question being whether, under the 9 & 10 Vict. c. 99, ss. 128, the cause of action arose wholly or in some material part within the jurisdiction of the Waltham district of the County Court of Essex. We are of opinion that no part arose within the jurisdiction of that court. The facts were shortly these. The defendant, residing at Waring, within the jurisdiction of that court, ordered a ploughshare and a plough to be sent by the plaintiff to Waring by the Eastern Counties Railway, it being agreed that he, the defendant, should pay the carriage. The manufactory of the plaintiff was in Essex. The plough and the ploughshare were made in that manufactory, and were delivered according to order at the station of the Eastern Counties Railway Company

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at Stratford, not within the jurisdiction of the Waltham County Court, and were forwarded by the carrier to the defendant, and he received them at Waring. The action was brought for goods sold and delivered, and the plaintiff recovered the sum of 3*l.* 10*s.* A suggestion was entered that the cause of action arose within the jurisdiction of the County Court for Waltham. Now, we are of opinion that it did not—no part of it—because the cause of action was completely out of the jurisdiction, and, therefore, no part could have arisen within the jurisdiction. The order was given at the office in Fenchurch-street. The articles were made in Essex, and were delivered according to order at the station at Stratford; and when they were delivered there, they were delivered to the defendant, and he was liable to an action for goods sold and delivered. He might have objected to the quality of the goods, had they not been according to order; but he did not make any objection, and it must be taken that he could make no objection, and that they were according to order, and, therefore, as soon as the goods were delivered at Stratford, the cause of action was complete, and he was liable to the action for goods sold and delivered, in which the verdict was recovered. We are of opinion that the verdict was properly directed to be entered for the plaintiff upon the issue, and that there should be no rule in this case.

Rule refused.

ROLLS COURT.

January 18, 1851.

WRIGHT v. CATTELL.

*Jurisdiction of the Court of Chancery over County Courts—
Prohibition.**Prohibition being applied for to the Court of Chancery to restrain a County Court from carrying into execution a judgment therein concerning the title to land, and the judges of the Law Courts being all (except the judge at chambers, who has jurisdiction in such a case) on circuit:**this court has jurisdiction to issue a prohibition to the County Judge out of the Petty Bag Office, and a prohibition was in accordingly issued. (a)*

was a case in which the jurisdiction of the Court of Chancery to issue a writ of prohibition out of the Petty Bag Office of a County Court judge came in question. The motion of the court should grant an order, or give a direction to the Petty Bag Office to issue a writ of prohibition against Frederick Trotter Dimsdale, the judge of the County of Warwick, from carrying into execution a judgment upon an action in that court, entitled between Jesse Wright, plaintiff, and Cattell, defendant. It appeared that the application to the Court of Chancery was rendered necessary by reason of the Law judges being all upon circuit, except a judge at chambers, who had no jurisdiction in such a matter. The Petty Bag Office was regulated by the provisions of the 11 & 12 Vict. c. 109, by the 12 & 13 Vict. c. 109, by sect. 34 of which it is enacted, that the judges of the Superior Courts of Law shall have the same powers as in actions brought in the County Courts; and by sect. 39 they are empowered to discontinue matters arising out of, or incident to, any action on the Law side of the Court of Chancery; and by sect. 48 they are authorized to take cognizance of all writs issued out of the Petty Bag Office. The jurisdiction of the Lord Chancellor, and of the Master of the Rolls, is preserved by the 46th sect. of the act. Under these circumstances, therefore, counsel appeared in support of the motion, and contended that the Act of Parliament above stated did not take away the ancient jurisdiction of the Court of Chancery to issue the

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writ in question, though the common law judges are also thereby empowered to hear and determine the question, and it is no longer necessary for them to make any return to this court. The execution upon the judgment in the plaint was to issue in a few days, and if the court should, therefore, refuse the writ of prohibition, the defendant would be without any means of correcting the alleged error into which he conceives the Inferior Court has fallen. There can be no objection to the issuing of the writ as asked for; if it should turn out to have been obtained improperly, the plaintiff could easily obtain a rule calling upon the defendant to show cause before a judge at common law why the prohibition should not be set aside, or why a *supersedeas* should not issue. Then, as to the merits, the defendant is sued for rent; but he denies the title of the plaintiff or landlord. The question accordingly resolves itself into one concerning the title to land, and it comes within the 58th section of the 9 & 10 Vict. c. 95, where it is provided that the County Court shall not have cognizance of any action of ejectment, or in which the title to any corporeal or incorporeal hereditaments shall be in question. The judge of the County Court, however, has made an order to pay, and execution is about to issue.

The MASTER of the ROLLS was of opinion that he still has jurisdiction to issue the writ, and accordingly granted the motion.

COURT OF EXCHEQUER.

Hilary Term, 1851.

PARKER v. THE BRISTOL AND EXETER RAILWAY.

§ 10 Vict. c. 95, s. 90; 13 & 14 Vict. c. 61, ss. 2, 16, construction of—*Certiorari*.

s. 16 of the County Courts Extension Act enacts, "that no judgment, order, or determination given or made by any judge of a County Court, nor any cause or matter brought before him, or pending in his court, shall be removed by appeal, motion, writ of error, certiorari, or otherwise, into any other court whatever, save and except in the manner and according to the provisions hereinbefore mentioned." And sect. 2 of the same act enacts that this and the General County Courts Act shall be construed as one.

Id., that the first-mentioned section is to be construed with reference to sect. 90 of 9 & 10 Vict. c. 95, and that the certiorari is not thereby taken away or limited to cases within the former jurisdiction.

Id., also, that when application is made to a judge of one of the Superior Courts at chambers for a certiorari, he should be put in possession of all the facts, the situation of the parties, and the stage of the cause, so as to be enabled properly to exercise the discretion given by 9 & 10 Vict. c. 95, s. 90; and therefore, where a certiorari had been obtained without the judge having been informed that the cause had already been heard in the County Court, the writ was set aside.

In this case a plaint was issued in the County Court of Gloucestershire, held at Bristol, on the 31st of October, 1850, against the defendants as common carriers, for the sum of 50*l.*, for overcharges in the carriage of goods. The cause came on for hearing on the 19th of November, and after having occupied six days, was adjourned till the 23rd of January. On the 20th of that month, an *ex parte* application was made by the railway company to a judge at chambers, for a *certiorari* to remove the cause into this court, on the ground that it involved a question of right of toll, and therefore was not within the jurisdiction of the County Court; and further, that it raised a difficult point of law. The affidavits merely stated that the cause "had come on for trial, and was then pending." A rule having been obtained to quash the writ, on the ground that it was taken away by 13 & 14 Vict. c. 61,

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s. 19, and also that material facts had been suppressed u application to the judge :

Kinglake, Serjt., showed cause.—The 13 & 14 Vict. c. Act to extend the Act for the more easy Recovery of Small and to amend the same, by sect. 16 enacts, that “no judgment or determination given or made by any judge of a County nor any cause or matter brought before him or pending court, shall be removed by appeal, motion, writ of error, or otherwise, into any other court whatever, save and in the manner and according to the provisions hereinbefore made and sect. 2 enacts that this act, and the said recited acts of 1 and 13th years of Her Majesty, shall be read and construed as if the several provisions in the said recited acts do not inconsistent with the provisions of this act were repealed and re-enacted in this act.” The County Courts Act (9 & 10 Vict. c. 95, s. 90) enacts “that no plaint entered in any court under this act shall be removed or removable from the said court into any of Her Majesty’s Superior Courts of Record, by writ or process, unless the debt or damage claimed shall exceed £10, and then only by leave of a judge of one of the said Superior Courts, in cases which shall appear to the judge fit to be removed to one of the Superior Courts, and upon such terms as to pay costs, giving security for debt or costs, or such other terms as the judge shall think fit,” so that the whole is to be read and construed as one act, and the enactments in the act first passed considered as repeated in the subsequent one, unless where it should be inconsistent. It is clear it was allowed until the 13 & 14 Vict. passed, and there is nothing whatever inconsistent in that *certiorari* being still allowed. The question has been already decided at Chambers by Mr. Baron Parke and Mr. Baron Platt: (*Holdsworth*, 1 Cox, Mac. & Herts. 426.) The present act was brought for alleged overcharges made by the defendants u plaintiff for carriage of goods upon the railway. There were several items of account, and although the County Court had been sitting six days upon this case, it had only got through one of those. One of the company’s private acts (3 Vict. c. 47, s. 3) referred to, as to their keeping account of the receipt of toll. [PARKE, B.—They carry these goods as carriers; this is within the meaning of the act, but carriage; the section you refer to has no bearing on the present question.] It has been held that an application for a *certiorari* should be made to a judge in chambers in the first instance, and the defendants went accordingly, and obtained this order in the usual and proper form. [The Court intimated that it appeared clear the *certiorari* was taken away.]

Lush, contra.—Admitting the facts to be as supposed here for the sake of the argument at present, that the *certiorari* was taken away, the plaintiff insists that it has been obtained in this case improvidently, and that the writ was directed to be issued without such information as was absolutely required and necessary.

be laid before the learned judge who made the order. It is to be by leave of the judge of one of the Superior Courts in cases which shall appear to him fit, and also upon such terms as to payment of costs, giving security for debt or costs, and such other terms as he shall think fit; so that it is material to tell the judge in what stage the case is, and the position of the parties, in order to put him in possession of all the facts and all the circumstances attending it. Here they do not state anything of that sort, but merely say it came on for trial, &c. The plaintiff's claim here is simply for overcharges, not for tolls at all; if it were for tolls, *certiorari* does not lie. Prohibition, in such a case, would be the proper course. (He was then stopped by the court.)

COLLOCK, C. B.—I think the rule in this case should be made absolute, and I do so on one of the grounds only upon which it was obtained, and it is this:—It was necessary to state to the court who and what the parties were—in what state the case was when it had been done in it—and, in fact, full particulars should have been given of all the facts and circumstances relating to it, in order that he might be enabled to exercise that discretion as to payment of costs and otherwise as the Legislature contemplated, which is provided for by the 90th section of the County Court Act. But, it appears, was not done here, and upon that ground I think the rule ought to be absolute.

ARKE, B.—I am of the same opinion. I have not the least doubt upon the point whether the *certiorari* is taken away by the 13th section of the County Court Extension Act, and I am clearly of opinion that it is not, although it becomes unnecessary to decide that. That act, by the 2nd section, provides that such act and the previous County Court Acts, shall be read and construed as one act, as if the several provisions in the said recited acts contained, inconsistent with the provisions of that act, were repeated and enacted in it; and section 16 enacts that no *certiorari* is to be granted *except in the manner and according to the provisions therein mentioned*. The only question then is, whether there is anything in the Extension Act (the 13 & 14 Vict. c. 61) inconsistent with the provisions of the other County Court Act (9 & 10 Vict. c. 95), under which a *certiorari* may be issued in accordance with the 90th section. Clearly there is not, except it may be said there is a power of appeal given: but a power of appeal is not inconsistent with a power or right also to have a *certiorari*. On the application for the *certiorari*, the party applying should certainly communicate all the circumstances attending the case to the judge, because, upon such information it is he who is to exercise the discretion given him by the act as to security for costs, or imposing such other terms as he may think fit; and here, it appears, material facts were not communicated to the judge, and he may or may not have exercised his discretion, but how could he do so unless all the facts were brought before him? The question as to the toll does not arise: this is an alleged overcharge for carriage

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of goods, and upon this inquiry the subject of the tolls re
in the private act does not come in question. The rule
made absolute.

ALDERSON and MARTIN, BB., concurred.

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NOTE—The Court intimated that the defendants might apply again to a judge
upon setting forth a better statement of the facts.

Lush applied that the plaintiff might be served by defendants with notice o
intended application, that he might have the opportunity of attending before
judge at the same time.

The Court, under the circumstances, said this was reasonable, and directed it
accordingly.

COURT OF COMMON PLEAS.

Easter Term, 1851.

CROSS v. SEAMAN.

City of London Act—Plea of tender—Suggestion.

*Where a plaintiff demanded more than 20l., and the defendant p
to part a tender and payment into court, and except as to
never indebted, and payment, and at the trial recovered 18l. 6
addition to the 7l. 15s. paid into court :*

*Held, that under the 113th section of the City of London Sm
Act, the defendant was not entitled to enter a suggestion to de
plaintiff of costs.*

BREWER moved to enter a suggestion to deprive the
of costs under the 10 & 11 Vict. c. lxxi., s. 113 (the
London Small Debts Act.) The action was brought to
26l. 1s. 5d. The defendant pleaded, except as to 7l. 15s.
indebted, as to 7l. 15s. tender before action and payment int
and except as to 7l. 15s., payment. At the trial the
recovered 18l. 6s. 5d., in addition to the sum paid into cou
the plea of tender. The 113th section deprives the plaintiff
where he shall recover not more than 20l. This case is wit
rule laid down in *Turner v. Parry*: (1 L. M. & P. 747.
plaintiff admits the tender before action, and takes the amo
of court. [CRESSWELL, J.—Could he have sued for 26l. in t
Small Debts Court?] No. [CRESSWELL, J.—Was he not
to have 26l.? and if so, how was he to get it? The action w
brought for 26l.] The plaintiff would have had to pay th
of the plea of tender, and if the tender had been of the
amount claimed, the plaintiff would have failed in the actio

COURT OF COMMON PLEAS.

Easter Term, 1851.

BOOTH v. CLIVE.

Notice of action under 9 & 10 Vict. c. 95, s. 138.

prohibition issued, the judge proceeded, and committed defendant to prison for nonpayment of instalments, in pursuance of an order upon return.

an action was brought against him for false imprisonment, the judge by whom it was tried charged the jury that if the defendant, in making the order, had acted under a bonâ fide belief that he was a judge of the County Court made it incumbent on him to notwithstanding the prohibition that had issued, the act so done was considered as done in pursuance of the statute, and that he was entitled to notice of action under the provisions of the 138th section of the County Courts Act.

to be a right direction, and that it was for the jury to say if the defendant was reasonably believed he was so bound to proceed, and that if "bonâ fide" meant anything but good faith, it was used in contra-

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order that the plaintiff should be committed for the term calendar month to Horsemonger-lane Gaol, or pay the sum to be due and owing to the said Still in respect of two in of the said debt and costs so recovered as aforesaid, &c.

The defendant pleaded, secondly, that the grievances committed by the defendant after the passing of a certain 9 & 10 Vict. c. 95, intituled *An Act for the more easy B Small Debts*, and that they were, and each of them was pursuance of the said act, and that no notice in writin action had been given to the defendant within one calend before the action had been commenced, &c. The plainti that the grievances in the declaration mentioned were ne pursuance of the said act of Parliament in the said plea m

The cause came on for trial before Jervis, C.J., at the 1 sitting after last term, when the facts above stated were but it was not shown that any notice of action had been pursuance of the 9 & 10 Vict. c. 95, s. 138. The L Justice, in summing up, told the jury that if the deft trying the cause and making the order, acted under a belief that his duty as judge of the County Court made bent on him to do so, notwithstanding the prohibition issued out of the Petty-bag Office, the act done by him considered as done in pursuance of the County Court Act was entitled to notice of action, and that it was for the whether the defendant reasonably believed that he was to proceed; and that if "reasonably" meant anything good faith, it meant according to reason, and in contrad to acting "capriciously." The jury found a verdict defendant.

Humfrey now moved for a rule to show cause why a should not be granted, on the ground of misdirectio defendant was not entitled to the protection of the statu manner in which the learned judge left the question to was incorrect. He should have asked them whether they a reasonable man, filling the situation of the defendai have pursued the course he did. The writ of prohibi binding on him; and it was impossible to say that he belie in disregarding it, he was acting in pursuance of the statu v. *Evershed* (10 Q.B. 143) is directly in point. That was of trespass for giving the plaintiff in charge to a const malicious injury to a house. The defendant was attorne owner, and alleged that he had acted under 7 & 8 Geo. ss. 24, 28, and was entitled to notice under 41st section was held that, before he could claim the benefit of the sta jury must be satisfied not only that he acted *bonâ fide*, bu had a reasonable belief that he was the owner's ser possessed his authority. In *Hopkins v. Crowe* (4 Ad. & the Court of Queen's Bench decided that a defendant, given the plaintiff into custody, under the 6 Will. 4, c. 1 for ill-using a horse, the property of his father, was not en

tice of action, even though he acted *bonâ fide*, inasmuch as the
tute applied only to an officer or owner of an animal ill-treated,
ing upon view or information. He also referred to *Wedge v.*
rkeley (6 Ad. & El. 663); *Hughes v. Buckland* (15 M. & W.
5); *Horn v. Thornborough* (3 Ex. 846.)

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The judgment of the court was now delivered (24th April) by
ESSWELL, J. After stating the facts, his lordship proceeded:—
great many cases were mentioned by Mr. Humfrey, in which
right to notice of action was discussed. At first it seems diffi-
t to reconcile all the expressions used by judges in dealing with
se cases; but on examination the difficulty is rather seeming
n real, and arises from the circumstance that the language used
the judges, with reference to particular circumstances, has been
rwards quoted, and used by them generally. First, we find
e judges saying, the parties are claiming notice of action because
acts imputed to be done in a particular character, or in the
rcise of a particular authority, such parties either having or not
ing reasonable ground for believing they filled that character or
that authority, whereas it is manifest the meaning of the words
d by them is, that the parties must, according to the evidence,
assumed to have acted in the *bonâ fide* belief that they filled
t character, or had the authority then in question; and in other
s the judges have said the real question is whether the party
s *fide* believed it, and acted under that belief. Now, then,
ly that to this case. There is a difference in the terms used
agh there is no difference in the principle laid down in the
s, and we apprehend the true principle in determining its appli-
on is, did the defendant in trying the cause honestly believe his
y as judge, under the County Court Act, called on him to do

The last case, that of *Horne v. Thornborough* (3 Ex. Rep.
) illustrates the view we have taken of the whole series of
horities. There a reversioner caused a party to be apprehended
er the Malicious Trespass Act, the 7 & 8 Geo. 4, c. 3, an action
trespass was brought against him, and he pleaded “not guilty,
er the statute,” and “no notice of action given.” The
rt of Exchequer held he was entitled to notice of action, pro-
d he *bonâ fide* believed he was acting in pursuance of the
ute,—which was strictly in accordance with the ruling in the
ent case. It is remarkable that Mr. Baron Parke mentioned
case of *Hughes v. Buckland* as a decision that the protection
rded by the statute then under consideration is extended to all
ons who had a *bonâ fide* belief that they filled the character
tioned in the statute, and acted *bonâ fide* under that belief.
ghes v. Buckland was mentioned by Mr. Humphrey as an
hority for holding that a *bonâ fide* belief would not suffice,
es founded on reasonable grounds. Lord Cranworth, in his
gment, held that the use of the word “reasonably” was in-
ded to explain what was meant—the word there being an
edient—to enable the court to arrive at a conclusion as to the

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bona fides; and it does not appear to be used in any variance with that in the case of *Kine v. Evershed* (10 Q. 143.) The defendant there was an attorney to the mortgagor, a house, and gave the plaintiff into custody on a charge of damaging the house, and the learned judge who tried the case asked the jury whether the defendant acted *bona fide* in applying the plaintiff, or whether the charge was colourable. They found that he acted *bona fide*, whereupon the judge gave a nonsuit, and the court, upon being moved for a new trial, giving judgment, observed, that the jury were asked whether the defendant acted *bona fide*, or whether the proceeding was colourable or not, no question being put as to his being a servant having authority from the mortgagee, or reasonably believing himself to be in either of those positions. Ultimately, the court they should have been asked not only as to the *bona fide* belief of the defendant, but as to his reasonable belief that he was the owner of, or had the authority of, the mortgagee. Now the *bona fide* there meant, is the *bona fides* on which the jury were asked for their opinion, namely, whether it was an honest charge as opposed to a colourable charge, and the reasonable belief afterwards mentioned is equivalent to a *bona fide* belief that he was the servant of, or had the authority of, the mortgagee. And this makes the case consistent with the opinion of the Court of Exchequer, in *Thornborough*, and many earlier cases, such as *Wedge v. Wedge* (6 A. & E. 663), and various others, which it is unnecessary to mention. The case of *Hopkins v. Crowe* is not at variance with this view of the subject. The statute 5 & 6 Will. 4, c. 63, gives authority to the owners of horses to give in charge persons who are cruel to those animals. The defendant, it was held, was the son of the owner of a horse that had been ill-used, and gave the party in charge. It was held, that he must be taken to know the law, namely, that the owner only was the party authorized, and that he had not, and could not have, any legal ground for believing himself to be the owner; therefore he was not protected by the statute. There, the absence of all legal ground for such belief was a sufficient ground for holding that he did not act under that *bona fide* belief which was necessary to entitle him to a statutory protection. We therefore think that the decision of the Lord Chief Justice is right, and ought not to be disturbed. There will, therefore, be no rule.

Rule r

May 1, 1851.

BARON ALDERSON, sitting alone to hear motions in the Court of Exchequer Chamber.)

FRY v. WHITTLE.

Suggestion—Form of affidavit.

it to found a motion for a suggestion to deprive a plaintiff of under the County Courts Act (9 & 10 Vict. c. 95, ss. 128 and it allege with certainty and precision that the plaintiff did not at the commencement of the action dwell more than twenty miles from the defendant, and where the affidavit stated that the plaintiff at the time of the commencement of the action dwelt at Birmingham, which is within twenty miles from Wolverhampton, the place where the defendant dwelt, and carried on his business at the time this action was commenced:

insufficient, as not showing that the plaintiff and defendant dwelt within twenty miles of each other at the time the action was commenced.

As an application for leave to enter a suggestion upon the Court roll, to deprive the plaintiff of costs, under the County Courts Act (9 & 10 Vict. c. 95.)

The affidavit upon which the rule *nisi* was granted, stated that the plaintiff named plaintiff now dwells, and at the time of the commencement of this action dwelt at Birmingham, in the county of Warwick, which is within twenty miles from Bilston, aforesaid, where the defendant now dwells, and also within twenty miles from Wolverhampton, in the said county of Stafford, and that the deponent dwelt and carried on his business at the time the action was commenced by the plaintiff against the

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action dwell more than twenty miles from the defendant. *v. Barton* (1 Cox, Macrae & Herts. 277), the affidavit was in which stated the defendant carried on his business within the jurisdiction of the Southwark County Court, and that the defendant did not dwell more than twenty miles from the defendant's dwelling within twenty miles of the defendant, on the ground that the defendant did not show distinctly that the defendant dwelt within twenty miles from where the plaintiff dwelt. *Peterson v. Davis* (1 Cox, Macrae & Herts. 148), cited in *Duck v. Barton*, and upon that case was decided, is to the same effect. In *Kirby v. Barton* (1 Cox, Macrae & Herts. 309), the affidavit stated, that the defendant dwelt and still dwells in K. street, within twenty miles of the plaintiff who dwelt and still dwells in P. street. This was held insufficient for not showing that the residences were within twenty miles of each other. In *Room v. Cottam* (1 Cox, Macrae & Herts. 309), the affidavit stated that plaintiff, at the commencement of the action, did not dwell more than twenty miles "from the defendant," was held bad for not saying "from the defendant's residence;" and in *Brooker v. Cooper* (1 Cox, Macrae & Herts. 309), the court laid down that the defendant must show affirmatively that the case is not within the exceptions contained in the Statute. The court may take judicial notice, perhaps, of the boundaries of a county, but certainly not of a town.

Pashley, in support of the rule.—The court will not interfere in discovering difficulties where a clear *prima facie* case is made out, and the affidavit is reasonably conclusive. In this case there can be no reasonable doubt, upon reading this affidavit, that at the time this action was commenced the defendant resided within twenty miles of where the plaintiff dwelt; and the affidavit stated that the plaintiff dwelt at Birmingham, which is within twenty miles from Wolverhampton, where the defendant dwelt. [ALDERSON.—Suppose they lived twenty-five miles apart from each other, upon this affidavit the party making it was to be tried for not doing so, do not you think you could go to the jury for an acquittal? perfect success?] That would depend upon circumstances. The doubt here lies upon the defendant here to make out that the Statute of Parliament has been complied with; and the question is, whether he has not done so with reasonable certainty. Part of Birmingham may be within, and part without the distance, and it is to be presumed it is within as without the town. [ALDERSON.—Can you say that from Wolverhampton includes Wolverhampton?] In *Wilkinson v. Goston* (9 Q. B. 137), it was determined that the word *from* was to be taken as including, not excluding, the place there mentioned; and Patteson, J., said: "This demurrer is founded upon the notion that the word 'from' must be exclusive; otherwise I cannot see how the demurrer can be sustained again." The demurrer is wrong in assuming that the word *must* be exclusive; though I agree that *prima facie* it is so. Williams, J., said: "To say the word is necessarily exclusive would, I think, be erroneous."

ALDERSON, B.—The affidavit is insufficient, and the rule must be discharged; and as in all the previous cases where it has been charged it was discharged with costs, so here I wish to follow precedents.

Rule discharged with costs.

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COURT OF EXCHEQUER.

January 18, 1851.

MUNGEAM v. WHEATLEY.

certiorari—*Replevin*—9 & 10 Vict. c. 95, ss. 90, 121; 13 & 14 Vict. c. 61.

to obtain a writ of certiorari to remove an action of replevin, it is required by the 121st section of the 9 & 10 Vict. c. 95, that a declaration should be made that the title to a corporeal hereditament, &c., is in question, or that the rent in respect of which the distress had been taken was more than 20l., and also that a bond should be entered into, with sureties to be approved by the clerk of the court, to prosecute the suit with effect, and without delay, and to prove before the court by which the suit should be tried that such title was in dispute, or that there was ground for believing that the said rent or damage was more than 20l.

It is not necessary that these conditions should be complied with before applying for a certiorari.

It is also, that the 13 & 14 Vict. c. 61, does not apply to actions of replevin.

In this case an action of replevin had been brought in the County

Court of Kent. On the 4th of November the defendant obtained a writ of certiorari, on the ground that the rent exceeded the sum of 20l. The case stood for trial on the 8th of November, on that day the plaintiff and defendant attended, accompanied by their counsel and attorneys, at the County Court, when the writ of certiorari was presented to the judge, and the defendants appeared themselves prepared to meet the requirements of the 121st section of the County Courts Act, viz., to make the declaration that the rent in respect of which the distress had been taken exceeded 20l., and to enter into the bond, with sureties to be approved, to prosecute the suit with effect and without delay, and to prove

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before the court by which the suit should be tried that there was ground for believing that the said rent was more than 20*l*. It appeared that notice of the names of the proposed sureties had been given to the clerk of the County Court on the 6th, and he had refused to approve of them, as he had not had time to inquire into their circumstances. Whereupon the judge dissolved the writ of *certiorari*, and proceeded to hear the cause, and the plaintiff obtained a verdict.

The defendant then obtained a rule *nisi*, calling on Mr. Espin, the judge of the court, to show cause why an attachment should not issue against him for disobeying the writ of *certiorari*.

Horne now applied to the court for a rule calling on the defendant to show cause why the writ of *certiorari* should not be quashed, on the ground that it had issued improvidently, and the terms of the 9 & 10 Vict. c. 95, s. 121, and 13 & 14 Vict. c. 61, s. 1, had not been complied with. By the 9 & 10 Vict. c. 95, s. 121, it was provided that any person seeking to remove a replevin suit should enter into a bond, with two sureties, approved of by the clerk of the County Court, in such sum as to the judge should seem reasonable, to prosecute the suit to effect and without delay, and to prove before the court by which the suit should be tried, that such title as aforesaid was in dispute between the parties, or that there was ground for believing that the said rent or damage was more than 20*l*.; then, and not otherwise, the *certiorari* should issue. In the present instance, the conditions were not complied with until after the *certiorari* was issued. The writ was returnable on the 8th, and on the 10th a letter was received by the clerk, stating the names of the sureties, one of whom lived eight miles from Gravesend and the other at London; the clerk of the court had not approved of the sum, for he had not had time to make the requisite inquiries. The section of the act required the party seeking a *certiorari* to appear before a judge of the Superior Court and enter into such bond as to payment of costs, giving security for debt or costs, and other terms as he might think fit to impose. Here the writ of *certiorari* had been granted without any terms being imposed. And, further, it did not appear that the rent in question or the value of the replevin was not below 50*l*., and if so, the judge of the County Court had jurisdiction under the 13 & 14 Vict. c. 61, which provided that all "the powers and provisions" of the 9 & 10 Vict. c. 95 should extend to debts and demands not exceeding 50*l*., and the two acts should be read and construed as one act. The writ was also conditioned for proving that the rent exceeds 50*l*. instead of 20*l*.. There is a case of *Morton v. Morton*, in which Rolfe, B., sitting in chambers, is reported to have quashed a writ of *certiorari* on the ground that it had been obtained without a previous compliance with the 90th and 121st sections of the County Courts Act.

By the COURT.—It was not necessary that the conditions imposed by sect. 121 should be complied with before the *certiorari* was issued.

sued, and if, in fact, they had not been complied with at all, that might be shown as cause against the attachment, but is no ground for quashing the writ. The judge was at liberty to grant the *replevin*, without imposing terms, if he saw fit. We do not see how the 121st section of 9 & 10 Vict. c. 95, can be incorporated with the Extension Act. The County Courts Extension Act (3 & 14 Vict. c. 61), which extends the jurisdiction of the County Courts to cases where the "debt, damage, or demand" does not exceed 50*l.*, does not apply to actions of *replevin*.

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—*Certiorari*.

Rule refused.

COURT OF COMMON PLEAS.

Easter Term, 1851.

HUNT v. THE GREAT NORTHERN RAILWAY COMPANY.

Prohibition—"Tolls"—Jurisdiction—9 & 10 Vict. c. 95, s. 58.

The Great Northern Railway Company's Act (13 & 14 Vict. c. 51, s. 13), provides that the company, "with respect to the conveyance of goods and minerals, may lawfully demand and receive as their maximum rate of charge for the conveyance thereof along their railway, including the tolls for the use of the railway and trucks, and locomotive power, except (amongst other things) a reasonable sum for warehousing and wharfage, for every carriage, fourpence-halfpenny a mile; and the company shall not be compelled to provide waggons and carriages for the conveyance of coal," &c.; and by the 16th section, the company "is required at all times to provide sufficient locomotive power, and to convey all merchandise, articles, empty waggons, matters and things, upon and along their railway."

The plaintiff requested the company to convey several of his trucks, laden with coal, along a portion of their line, but the company first demanded a certain sum per mile for the returned empty carriages, which the plaintiff refused to pay, alleging they ought to be conveyed back free. Several trucks having been delayed in consequence of this dispute, the plaintiff brought a plaint in the County Court for damages accrued by reason of this conduct of the company; and, notwithstanding an objection to his jurisdiction, the judge tried the cause, giving judgment in the plaintiff's favour.

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Prohibition—
"Tolls"—
Jurisdiction.

On motion for a prohibition, under 9 & 10 Vict. c. 95, s. 58, on ground that a question of title to "tolls" was involved, and that, therefore, the County Court had no jurisdiction:

Held, that title to "tolls," as meant in the County Court Act, was here in question; and, therefore, as the judge had jurisdiction prohibition would not lie.

BYLES, Serjt. (*Wordsworth* with him), moved for a rule on the plaintiff to show cause why a writ of prohibition should not issue in this case to restrain all further process in the County Court at Barnet. This was an action for loss sustained, and expenses incurred, by reason of delay in the carriage of certain goods along the Great Northern Railway from London to a place called Potter's Bar, and for refusing to pay tolls. By their act (13 & 14 Vict. c. 51, s. 13), the company "with respect to the conveyance of goods and minerals, may lawfully demand and receive, as their maximum rate of charge for the conveyance thereof along their railway, including the tolls for the use of the railway and trucks and locomotive power, (amongst other things) a reasonable sum for warehousing, wharfage, for every carriage fourpence-halfpenny per mile the company shall not be compelled to provide waggons and carriages for the conveyance of coal," &c. By sect. 16, the company "is required at all times to provide sufficient locomotive power, and to convey all merchandise, articles, *empty waggons*, and other things, upon and along their railway." A similar motion had been made before Coleridge, J., in the Bail Court, (a) who refused the rule, but the application to this court is made upon new affidavits. The facts of the case are as follows:—The plaintiff having several trucks of coal for conveyance by the Great Northern Line from Peterborough to Potter's Bar, desired the company to perform that service. But the company now required payment for the forward carriage, but charged nothing for the back carriage, which they said they were entitled to under the 13th section of their act. The plaintiff having refused to pay in advance the amount so claimed for returned empty carriages, the company refused to carry the trucks at all. The plaintiff gave them notice he should claim and sue for loss of time and of expenses occasioned by delay, with such expenses as he had been compelled to incur by this conduct of the company, and eventually brought his plaint in the County Court for the damages sustained through the refusal of the company to carry the trucks. When the case was tried, it was objected that the court had no jurisdiction, because a question of title to "tolls" was involved in the case. The judge, however, tried the case, and gave judgment for the plaintiff for 39*l.* 13*s.* 6*d.*; and on the 5th of April an order was served on the company for the payment of 53*l.* 10*s.*

(a) On that application, Coleridge, J., was of opinion that as the title to the tolls was not denied, but only the time at which it was demandable and payable, which depended upon the construction to be put upon the act of Parliament, the judge of the County Court had jurisdiction, and therefore he refused the writ.

the amount of damages and costs. One question is, whether the word "carriage" in the company's act, means a carriage running on its own wheels, or a carriage which may be placed on a truck. It is contended for the company that the plaintiff was compelled to pay fourpence-halfpenny for every empty "truck" returning on the line. The carriages run on their own wheels, drawn by the company's engines; in fact, it is the company's horse and the plaintiff's carriage. It is submitted the court should grant this writ for a prohibition on the ground that the title to take this toll is disputed by the plaintiff. The question entirely turns on the word "toll." The 58th section of 9 & 10 Vict. c. 95, contains a proviso that the County Court "shall not have cognizance of any action of ejectment, or in which the title to any corporeal or incorporeal hereditaments, or to any toll, fair, market, or franchise, shall be in question. [WILLIAMS, J.—Why did you not come to the court for *certiorari*?] Because prohibition is the proper remedy. The cause has been tried, and, generally speaking, *certiorari* does not lie after trial. The question is, whether this is "toll." If it is, then it raises a question of title. It is submitted that the toll for empty waggons is here in dispute. The word "toll" is applicable to goods carried upon the company's own waggons, to carriages conveyed on the company's trucks, and to the carriages of others conveyed by the company's locomotives. PERVIS, C. J.—You must show that title came in question, and that the judge did not decide the matter of fact, for that was the province. By the COURT.—The question as to title to "toll" does not appear to the court to arise here. There will, therefore, be no writ in this case.

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Rule refused.

COURT OF COMMON PLEAS.

Easter Term, 1851.

PREW v. SQUIRE.

§ 14 Vict. c. 61, ss. 11, 12, 13—Costs—Demurrer—Writ of inquiry. Plaintiff obtaining judgment upon demurrer in an action of covenant, and recovering less than 20*l.* damages upon a writ of inquiry, is deprived of his costs by the 11th section of the County Courts Extension Act. Here, whether the word "verdict," in the 12th section of 13 & 14 Vict. c. 61, includes a verdict on a writ of inquiry: (see *Reed v. Shrubsole*, 1 Cox, Mac. & Herts. 226.)

THIS was an action of covenant. The defendant demurred to the declaration, and judgment was given for the plaintiff. On the 1st February interlocutory judgment was signed, and a writ of

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inquiry was subsequently executed, and the jury gave a finding for damages. On the 26th February the costs were taxed, and then objected for the defendant that the plaintiff was not allowed to his costs; but the master thought that the judgment by default under the exception in the 11th section of 13 & 14 Vict. c. 61. The plaintiff having entered up a perfected final judgment for damages and costs, a rule was made by Prentice, on a former day of this term, calling upon the plaintiff to show cause why so much of the judgment as related to the costs of the action should not be set aside, and why he should not be allowed the costs of the application.

Byles, Serjt. (Wordsworth with him), showed cause. The question is, whether a plaintiff who gets judgment upon a demand is deprived of costs by the County Court Act if he recovers more than 20*l.* damages. That question depends upon the construction of 13 & 14 Vict. c. 61, ss. 11, 12, and 13. If the court holds that those actions deprive him of costs in such cases, it will follow that questions of law of the greatest importance and difficulty which may also sometimes involve large sums, can no longer be brought before the Superior Courts. Thus, in an action against the Bank of England for a half-yearly dividend of 18*l.* an important question of law may be involved, and the sum really in dispute may be 1,200*l.*, Three per Cent. Consols; yet if the court holds that on the other side is to prevail, such an action must be brought in the Superior Courts without a loss of his costs to the plaintiff. To prevent such hardship, the court will, if necessary, strain the language of the acts. It is admitted that the plaintiff could not have obtained a certificate from a judge in chambers under the 13th section; for the action is not one in which the courts have "concurrent jurisdiction," or one for which "no plaint could have been entered in any County Court," or one which was it "removed by *certiorari*." Nor could any certificate have been procured under the 12th section, because the word "verdict" has been held to mean "verdict on issue joined;" (*Reed v. Shrubsole*, 1 Cox, Mac. & Herts. 226.) [JERVIS, C. J.—It is not that "verdict" means any recovery before a jury. If the hardship suggested will be cured by the certificate of the proper officer. WILLIAMS, J.—The principle on which I proceed in *Reed v. Shrubsole* was, that the word "verdict" being susceptible of a narrow or wide meaning, and justice and convenience requiring that it should be construed in the narrow sense in which I adopted that construction.] That decision is undoubtedly weakened by the circumstance that Cresswell, J. dissented from the rest of the court; nevertheless, it must be taken as deciding that the word "verdict" in the 129th section of the earlier act, means a verdict upon the trial of an issue, and the same meaning is given to the same word in the 12th section of the recent act. The question is, whether the 11th section protects the plaintiff in such a case; that depends upon whether the judgment which he has obtained can be considered a judgment by default. It is admitted that

eral meaning of those words is—a judgment where a day being
 en to the defendant *in banco*, he does not come; or coming,
 s nothing; or his attorney says, *non sum informatus*; but it may
 o mean a judgment in a case where the defendant does not dis-
 te the facts. At all events, if the judgment be wrong, the error
 ears on the record, and the defendant should bring his writ of
 or.

Wordsworth.—It has been held that the words in Lord Denman's
 t (3 & 4 Vict. c. 24), s. 2, "if the plaintiff in any action of
 spass, or of trespass on the case, shall recover by the verdict
 a jury less damages than 40s., such plaintiff shall not be
 titled to recover or obtain from the defendant, in respect of such
 dict, any costs whatever," do not comprehend an inquiry after
 lgment on demurrer: (*Taylor v. Rolfe*, 5 Q. B. 557.) There is
 o a technical objection to this rule, which is, that the rule ought
 have been to amend the inquisition.

Prentice, in support, was not called upon.

JERVIS, C. J.—I am of opinion that this rule should be made
 olute. I think we ought not, as has been suggested, put the
 endant to his writ of error; for by so doing we should only
 pel him to resort to an expensive process, and give the plaintiff
 opportunity of persecuting him into terms of compromise.
 here, indeed, a reasonable doubt exists, we ought not to prevent
 arty from carrying his case to a Court of Error; but where
 case is plain, I think we ought not to listen to the suggestion
 ich has been made on the part of the plaintiff. Neither do I
 nk we should listen to the technical objection; for though the
 nquisition be ever so bad, it does not affect the defendant. We
 n come to the substantial question, and I think that does not
 end upon the meaning of the word "verdict" in the 12th
 tion. If there was a manifest injustice in our construction of
 act, and the words were so doubtful that, in order to avoid
 njustice, we should feel ourselves at liberty, as it were, to legislate
 ourselves, we might be induced to strain the language of the
 ; in the manner suggested. But it is not necessary to resort to
 ch a mode of construction, for the words in the act are perfectly
 un. The 11th section says, that "if any action commenced
 er the passing of this act, in any of Her Majesty's Superior
 urts of Record in covenant," which this is, "the plaintiff shall
 cover a sum not exceeding 20*l*," which is the case here, "The
 intiff shall have judgment to recover such sum only and no costs,
 cept in the cases hereinafter provided (of which this is not one), and
 cept in the case of a judgment by default," which this clearly is
 t. Then, as this is not a judgment by default, the question
 en is, what is the meaning of the word "recover," "recover by
 dict," and that is what the plaintiff gets in the action. Here
 has got a farthing, which is less than 20*l*. This, therefore, is an
 tion of covenant in a Superior Court, in which the plaintiff has
 covered less than 20*l*., and which is not within the exceptions in
 e act. I think, therefore, he is not entitled to costs. As to the

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meaning of the word "verdict," it will be time enough for us to put a construction upon that when the question arises by the presiding judge certifying upon a writ of inquiry.

CRESSWELL, J.—I am entirely of the same opinion. The plaintiff has recovered a sum not exceeding 20*l*. in an action of covenant in this court, and he is not within either exception in the 11th section. It is unnecessary to consider now what is the meaning of the word "verdict" in the 12th section. On a former occasion the court differed as to the meaning of that word in the 129th section of 9 & 10 Vict. c. 94. I only advert to the subject, to say that if the question should arise again, I shall be ready to reconsider the reasons of my judgment, which vary very much in the several reports, and which in some of them appear to me to be unintelligible.

WILLIAMS and TALFOURD, JJ., concurred.

Rule absolute.

COURT OF EXCHEQUER.

Sittings after Michaelmas Term, 1850.

HALLIWELL v. EASTWOOD.

Pontefract Honour Court—Replevin—9 & 10 Vict. c. 95, s. 5—Distress—Fixed machinery.

The jurisdiction of the Court Baron of the Honour of Pontefract was extended by 17 Geo. 3, c. 15, which recognized its ancient right of granting replevins. The 2 & 3 Vict. c. 85, further extended the jurisdiction under the title of the Court of the Honour of Pontefract, and provided that six months after the passing of any general act for the recovery of small debts, the operation of which should interfere with the powers given by that act, that act should cease and determine; and the 9 & 10 Vict. c. 95, gave power to Her Majesty to appoint County Courts, and repealed all acts affecting the jurisdiction of such courts:

Held, that the construction of these statutes was to destroy the newly-constituted court of the Court of the Honour of Pontefract. That the old court being previously put an end to, was not revived by the subsequent act, and therefore that no power remained to grant replevin.

Certain cotton spinning machines were fixed by means of screws, some in wooden fastenings, and some fixed in stones with molten lead, and thereby fastened to the building. The machines were distrained for rent, and subsequently replevied:

Held, that they were not a part of the freehold, but were properly distrainable.

THIS was an action of trespass for breaking and entering certain mills, and seizing certain goods and fixtures, tried before Alderson, B., at the last York assizes. Plea, not guilty, by statute. The

plaintiff was tenant of certain premises, and the defendant the landlord. A distress for rent had been put in, and certain fixed machinery and other goods seized; a replevin had been obtained without any complaint, out of the Court of the Honour of Pontefract, but the defendant had proceeded and sold the goods seized. At the trial it was proved that the Lord of the Court Baron of Pontefract had the right to grant replevins with reference to cases tried in the Court, but no evidence was produced of a franchise to grant replevins independently of the franchise of holding pleas in cases of replevin. The statutes 17 Geo. 3, c. 15, 2 & 3 Vict. c. 85, and 9 & 10 Vict. c. 95, were referred to, and the learned judge was of opinion that the Court Baron of the Honour of Pontefract had ceased to exist, and therefore that the replevin was void, and the jury returned a verdict for the plaintiff for 460*l.*, the value of the seized machinery, leave being reserved to move to increase the verdict to 2,500*l.*, the full amount of the value of the goods, if the court thought the replevin valid, and that trespass was the right form of action. In Michaelmas Term this rule was obtained accordingly.

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Hoggins, Q. C., shewed cause.—The question depends upon the construction of 17 Geo. 3, c. 15, recited in 2 & 3 Vict. c. 85, and on 9 & 10 Vict. c. 95. The question is, whether the power of granting replevin has been taken from the Court of the Honour of Pontefract by either of those acts. By 2 & 3 Vict. c. 85, s. 4, that power is taken away. (a) The Court Baron has become a new court, namely, the Court of the Honour of Pontefract. It is, however, contended that, by the operation of the County Courts Act, the Court Baron has been revived. That, however, could not have been the intention of the Legislature. *Pashley* on the same side.—The court is abolished, and the power to grant replevin cannot survive it: (*Hallat v. Burt*, Carth.

(a) The 2 & 3 Vict. c. 85, s. 1, enacts "that from and after the first day of November, 1839, the present jurisdiction and practice of the Court Baron of the Honour of Pontefract aforesaid, (except with respect to the town of Barnsley, and such other parishes, townships, and hamlets within the honour of Pontefract, as are also within the jurisdiction of the said Barnsley or Court of Requests and the said Barnsley Upper Court of Requests) cease and determine except as to any cause or matter commenced or pending therein before or on the said last-mentioned day as to which cause or matter the jurisdiction and practice of the said Court shall continue the same as if this act had not passed), and thenceforth the said court shall be constituted and be a Court of Record, under the name of the Court of the Honour of Pontefract." Section 4 enacts, "that the said Court of the Honour of Pontefract shall have the same power, practice, and jurisdiction in proceedings in replevin as the Court Baron of the Honour of Pontefract now has, and shall be empowered and authorized to hold pleas of debt where the debt sought to be recovered shall not exceed the amount of 15*l.*; and all other real actions arising within the jurisdiction of the said court, when the damages sought to be recovered shall not exceed the sum of 5*l.*, and where the defendant or defendants in any such case, or any one or more of such defendants shall, at the time of the commencement of such action, reside within the jurisdiction, or keep any house, warehouse, shop, countinghouse, stall, or other place of business or dealing whatsoever, or otherwise trade or deal therein." The 5th section enacts, "that at the expiration of six calendar months next after any general act shall be passed for the recovery of small debts, and the operation of which general act shall not interfere with the powers given to the said Court of the Honour of Pontefract by this act, every clause, matter, and thing in this act contained, which shall extend, or be construed to extend, to give to the court hereby appointed any local or separate jurisdiction shall cease and determine."

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380.) A prescription for a steward to grant replevin out of court is void: (Co. Entries, 294.) The word "steward" ought to read "sheriff." The lord may bring his action in a Court Baron because the suitors are the judges, but it cannot grant replevin except by charter or prescription. He cited Co. Entries, 294; *E v. Burt*, Carth. 380; Bac. Abr. "Court Baron" and "Replevin," Viner's Abr. "Replevin," Z.; Com. Dig. "Pleader," 3 K. 3 4 Trust. 266-269; Kitchen on Courts, 95 b, and 74 a; Co. Digest, "Copyhold," R. 14; 2 & 3 Vict. c. 85, ss. 44, 56.

Watson, Q. C. (Ellis and Hall with him), contra.—The lord and the Honour of Pontefract have power to grant replevin to the exclusion of the sheriff: (*Mounsey v. Dawson*, 6 A. & E. 101.) There is a distinction between the power of granting replevin and that of hearing them. The sheriff in liberties has no power to grant replevin, except where the bailiff has refused. It is not a suitor in Courts Baron that grants replevin. It is granted by lords, and though, since the passing of 9 & 10 Vict. c. 93, jurisdiction to hear appeals has been transferred to the new County Courts, still the right to grant replevins continues in the lords: (*Edmunds v. Challis*, 1 Cox, Macrae & Herts. 216.) The 5th section of the County Courts Act provides that Her Majesty may empower any court under the acts in schedules A. and B. to that act to do as a County Court, and may assign a district to the same. The act of 2 & 3 Vict. c. 85, was in schedule A., and the County Courts Act was put into operation for this district. The 6th section provides that, when a court shall be established under the act, the recited act and all other acts affecting its jurisdiction shall be repealed. He referred also to *Anon.* (1 New Reports, 101; 2 & 3 Vict. c. 85, s. 4. [PLATT, B.—It is an old count, and a new name. The question is, whether that count is abolished by the act of 2 & 3 Vict. c. 85, s. 5, says, that former counts for recovery of small debts and demands shall be repealed; but the act does not as to revive any act thereby repealed. [PARKE, B.—The 2nd section of the 2 & 3 Vict. c. 85, puts an end to the present jurisdiction and practice of the Honour Court of Pontefract unless you can set it up again in some way or other, it is void. Have you a single instance of a replevin granted by any officer of the court? No; there appears to be none. (Fitz. N. B. 72 f, 73 b; *Wilson v. Hobday*, 4 Mau. & Sel. 2 Inst. 139; 30 Edw. 3, p. 23; 9 & 10 Vict. ss. 5, 6, 119, 120; *Thompson v. Farden*, 1 Man. & Gr. 535; and Maule's, J., observations at p. 544, were referred to.)

PARKE, B.—It would be better to dispose of this one first; and in this case I have satisfied my mind that the power of granting replevin was taken away by the operation of the s

(b) The 119th section enacts, "that all actions of replevin in cases of distress for arrears, or damage *factant* which shall be brought in the County Court shall be brought in writ in a court held under this act;" and the 120th section, "that in every such replevin, the plaint shall be entered in the court holden under this act for the district in which the distress was taken."

The question is, is the power of holding replevin taken seems to me, on looking at the authorities, and the statutes, there is no doubt about it, and that the power, in the present instance, is taken away. The 17 Geo. 3, extends the jurisdiction of the Court Baron of the Honour of Pontefract, in replevin proceedings, to the amount of 5*l.*; then the 7*th* Vict. extends the jurisdiction to 15*l.*, that act puts an end to the power of hearing replevins in that court, but further provisions of the act give the power of granting replevins to the Court Baron of the Honour of Pontefract, and then comes the 56*th* Vict. which means that the new court shall be put an end to, and that the old court shall be restored. Then comes the 23*rd* & 24*th* Vict. c. 95, s. 5, which abolishes the court; the 2 & 3 Vict. c. 47, s. 3, mentioned in the schedule, and that court is abolished after the time there referred to. The effect of this is to take away the jurisdiction of the Court Baron of the Honour of Pontefract altogether; and so the power of hearing replevins in that court was put an end to before, and there is nothing here to be done, and therefore there is no jurisdiction now in the old court to grant or hear replevin. The granting replevins out of court, which was so closely connected with the court which ultimately tried them, that it is impossible to suppose it could exist after the court had been abolished.

MR. JUSTICE PLATT, BB., concurred.

Judgment for the defendants.

It was also a cross rule in this case, to enter a verdict for the plaintiffs, and the question was, whether mules used in agriculture are fixtures?

(*Ellis and Hall* with him) showed cause.—Fixed machinery is not distrainable: (Co. Litt. 47 a.; *Amos & Ferrard* on p. 314; *Hallen v. Runder*, 1 C. M. & R. 266; 2 C.

Minshall v. Lloyd, 2 M. & W. 450.) These things are fixtures of the cotton mill, some are fixed to the wooden frames, others are fixed in stones with molten lead; and as to the freehold cannot be distrained: (Com. Dig. s. 10; *Morley v. Pincombe*, 18 L. J. 272, Ex.)

(*Pashley and Hall* with him.)—Chattels that can easily be removed without injury to the freehold are distrainable, as in *Herlakenden's case* (4 Rep. 62; 2 Bla. Com. 428; s. 10); *Pitt v. Shew* (4 B. & Ald. 206); *M'Kintosh v. M. & W.* 184), were cited.

Cur. adv. vult.

JUDGMENT.—December 16, 1850.

B.—This case was argued a few days ago; a part of it was then disposed of. The question remaining to be decided is, whether cotton-spinning machines, which are fixed by means of screws, some in wooden fastenings, and some with lead in a molten state in stones, for the purpose of securing the screws, were, by law, distrainable for the use of the mill in which they were affixed. Before the

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machines were so attached, they were mere chattels, and doubtless they were distrainable chattels. The question is whether they lost that character by being attached to the floor in the manner described. The question is to be determined in the same way as it would have been if the statutes on the subject had not passed. No chattels could be distrained which were subject of distress at common law, except those provided for by statute, and this description of chattels is not. Neither the power to sell a distress, given by the statute of Will. 3, nor the power to impound on the premises given by the 11 Geo. 2, extends to distress of chattels not before the subject of it; still less the right of the landlord for a year's rent before the goods taken to execution can be removed, afford a reason for holding that goods that can be taken in execution can also be distrained. We must decide the case in the same way as if the distrainer were obliged to take the chattels distrained immediately to a public or private pound. At common law, things fixed to the freehold which become part of it, cannot be distrained: for two reasons. As Gilbert, C. B., says, "whatever is part of the freehold cannot be distrained, for what is part of the freehold cannot be severed from it without detriment to the thing itself in removal; consequently, that cannot be a pledge which cannot be restored *in statu quo* to the owner. Besides, what is fixed to the freehold is part of the thing demised, and the nature of distress is not to resume part of the thing itself for the rent, but the *inducta illata* upon the soil or house. Hence it is that windows, furnaces, &c., affixed to the freehold, are not distrainable" (Gilbert on Distress, 34-48), and on the sole ground that they were parcel of the freehold in the construction of law. Windows, and shutters concerning the realty are not liable to be distrained. It was, besides, a rule at common law that things which could not be restored in the same plight and condition could not be distrained for rent; that is laid down in Comyn's Digest, 47, and Gilbert on Distress, in the part I have already cited. We have, therefore, to decide whether these machines fall within either of these categories, otherwise they were not distrainable. They do not fall within the latter, for, being taken to the pound, they might be brought back without damage to the owner. They are not of a perishable nature, they would not suffer from careful removal. If it were necessary to take some to the pound in order to remove them, that circumstance would make no difference, for that might occur to chattels with respect to removal. There is no question, as, for instance, a post bedstead, which cannot be carried to a pound without being first taken to pieces; the distrainer would have no reason to complain that they were restored to him in a disjointed state at the pound, where he would attend to receive them. Nor does it make any difference that the distrainee would be obliged to bear the expense of refixing the machinery. Precisely the same objection might be made to distress on any article which it required expense to carry.

to pound and restore to its former position. A distrainee on law must be at the trouble and expense of taking back s from the pound. This practical inconvenience is now by the power of impounding upon the premises. The estion, therefore is, whether the machinery, when fixed, el of the freehold? and this is a question of fact depending circumstances of each case, and principally on two cons; first, the annexation to the soil, or, if brick, the house it is united, whether it can be easily removed *integra et* not without injury to itself or the fabric of the building. 7, upon the object and purpose of the annexation, whether for the permanent and substantial improvement of the ; in the language of the Civil Law, *perpetui usus causâ*, of the Year Book, 28 Hen. 7, 13, *per rente en quel' propriété*, &c., *en la possession*, or merely for a temporary purpose, more complete enjoyment and use of it as a chattel. considering this case, we cannot doubt that the machines ere part of the freehold, but were attached slightly to it, e capable of being removed without the least injury to the the buildings, the object and purpose of annexation was improve the inheritance, but to render the machinery and for the more convenient use of the inheritance. ever were part of the freehold any more than a carpet e, which is attached to the floor by nails for the purpose ng it stretched out, or curtains, or looking glasses, pictures, er matters of an ornamental nature which have been attached to the walls of a dwelling, as furniture, and probably the reason why those and similar articles have ld in different cases to be removable. The machines ave passed to the executors: that is laid down by Lord rst, in *Trappes v. Harter* (2 Cro. & M. 153), they would : passed by the conveyance or demise of the mill; they ased to have the character of moveable chattels, and were e liable to the distress: the result is that Mr. Watson's l be discharged, and Mr. Martin's rule will be made

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Judgment accordingly.

COURT OF EXCHEQUER.

April 29, 1851.

BEARCROFT v. GEORGE.

County Courts—Costs.

MACNAMARA moved for a rule that one of the Masters of the court be directed to tax the plaintiff's costs in this case. It was an action of debt brought for 7*l*. The defendant had paid in court 2*l*. 12*s*. 6½*d*. and, so pleaded. That sum had been taken out, and a *nolle prosequi* entered as to the residue. The defendant's costs upon the *nolle prosequi* had been paid by the plaintiff, who wished to be paid his costs of the suit in respect to the money paid into court. It was contended that the plaintiff was entitled to these costs under the Reg. Gen. Trinity Term, 1 Vic. notwithstanding the County Court Act, 13 & 14 Vict. c. 61, ss. 11 and 13; and that it had been so decided by Platt, B., in *Platt v. Jones*, ante, 422. The 43 Geo. 3, c. 46, s. 3, was analogous to *Keene v. Deeble* (3 B. & C. 491); and *Roe v. Rose* (2 C. & J. 100) were cited.

POLLOCK, C. B.—At present we give no opinion whatever upon the subject; but the costs of a rule here, the Master informs us, would be about 15*l*.; so that if you succeeded upon the rule your client must be a loser by obtaining it; and if he failed he would still be worse off. If you think it beneficial to your client's interest to proceed, or should the plaintiff persist under these circumstances in asking for a rule, take it.

Rule nisi (if desired.)

COURT OF QUEEN'S BENCH.

Easter Term, 1851.

BLOWERS v. RACKHAM.

Jurisdiction of Court of Appeal.

appeared that the amount claimed in the County Court was 20l., the Court of Appeal at once dismissed the appeal as not within their jurisdiction, under 13 & 14 Vict. c. 61, s. 14.

was an appeal from the County Court of Norfolk.
amwell, for the appellant.

for the respondent.

appeared that the amount claimed was under 20l.

COURT.—It appearing that the amount claimed by the
 in the original plaint was under 20l., this appeal must be
 , as we are of opinion that the appellate jurisdiction of
 is confined to cases where the amount is between 20l.
 by 13 & 14 Vict. c. 61, s. 14. (a)

Appeal dismissed.

if either party in any cause of the amount to which jurisdiction is given to the
 by this act shall be dissatisfied with the determination or direction of the said
 of law, or upon the admission or rejection of any evidence, such party may
 be same to any of the Superior Courts of Common Law at Westminster," &c.

COURT OF QUEEN'S BENCH.

February 17, 1851.

(Before WIGHTMAN and ERLE, JJ.)

FERNLEY v. BRANSON. (*a*)*Money had and received—Arbitrator's costs—Excessive demand—Payment.*

A lay arbitrator, under a submission, which provided that the award should be in the discretion of the arbitrator, awarded to himself an excessive amount of remuneration. The plaintiff was compelled to pay that sum in order to get the award, the amount having been reduced by the Master upon taxation:

Held, that the arbitrator could not by his award conclusively fix the amount of the costs. And, further, that the plaintiff might recover the excess beyond the amount of fair remuneration, in an action for money had and received to his (the plaintiff's) use.

THIS was an appeal against a decision of the judge of the Manchester County Court. The following case was put before the court for the opinion of the court.

"This is an action to recover the sum of 49*l.* 19*s.* 11*d.* particulars of the plaintiff's demand being for money paid by the plaintiff to the defendant for or in respect of his fees and charges in and about a reference and arbitration between T. M. Coombs and J. W. Freshfield, directors of the Globe Insurance Company, or the said insurance company and the above-named plaintiff.

At the trial before the judge, without a jury, it appeared by an agreement, dated the 20th day of April, 1849, between T. M. Coombs and J. W. Freshfield, two of the directors of the Globe Insurance Company, of the first part, and the said named plaintiff, of the second part, after reciting that disputes and differences had arisen between the said T. M. Coombs and J. W. Freshfield, as such directors of the Globe Insurance Company, and the said plaintiff, and that it had been agreed to submit the said disputes to arbitration, the said parties thereto did mutually covenant and agree to observe and keep the award of the said named defendant (therein described as John Branson, of Manchester, surveyor), a referee appointed by the said parties of the first part; and George Shorland, of Manchester, surveyor, a referee appointed by the said plaintiff, James Fernley, their umpire; and it was thereby agreed that the costs

of the submission and reference and award to be made in the discretion of the said arbitrators, or their umpire, and award direct by and to whom the same should be made by the two arbitrators duly appointed W. J. Tate, of Manchester, to be the umpire, after which the reference was made with. When the time arrived for making the award, the arbitrators differed in opinion, and the umpire alone made his award. He employed Mr. J. Speakman as his (the said umpire's) agent for that purpose. Mr. Speakman applied to the above-named defendant and the said George Shorland for the amount of charges. Upon which, the above-named defendant sent out of charges, amounting to 156*l.* 11*s.*, which was submitted to the said umpire, who considered the amount too much, and estimated it might be reduced to 105*l.*; and finally, with the umpire's concurrence, and by arrangement with him and Mr. Speakman, the charges of the said umpire and the above-named defendant, and the said E. Shorland, were settled at 105*l.* each, to which certain incidental expenses were added, making the amount due to each of them as follows:—To the said W. J. Tate, 3*d.*; to the above-named defendant, 109*l.* 6*s.*; and to George Shorland, 107*l.* 6*s.* By direction of the said umpire, he said Mr. J. Speakman, on the 30th day of July, 1849, called upon the parties to the reference that the award was ready to be taken up on payment of 379*l.* 10*s.* 9*d.* (which sum included the several sums before mentioned as charges made by the said arbitrators, and also 34*l.* 11*s.* 9*d.* for rooms, &c. for the reference, 17*s.* 6*d.* for stationery, and 15*l.* 17*s.* 6*d.* for preparation of the award. The plaintiff, on receiving the communication from Mr. Speakman, called upon him the same day to take up the award. The plaintiff said the amount to be paid was very high, and protested Mr. Speakman to give him (the plaintiff) particulars of the charges, to which Mr. Speakman replied he should give him particulars until the award was taken up; and on the day of this case it was admitted that arbitrators may often make a demand before delivering up the award, not only of their charges, but also of the allowances to witnesses and other incidental expenses. Mr. Speakman stated that he should not take up the award until the amount claimed was paid, but would not communicate that to the plaintiff, nor did the plaintiff require Mr. Speakman to give up the award without first paying the amount. The plaintiff did ask Mr. Speakman whether he (the plaintiff) was obliged to take up the award, to which Mr. Speakman replied—"No; but if you do not, perhaps the other side will be obliged to grumble at the amount, but finally paid the amount 9*d.* without making any further protest, and took the award. On the same day Mr. Speakman, out of the money paid to him by the plaintiff, paid the said W. J. Tate 3*d.*, the defendant 109*l.* 6*s.*, and the said G. Shorland the amount of their respective charges.

The award so made by the said W. J. Tate, and taken up by

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the above-named plaintiff as aforesaid, directed that the said T. M. Coombs and J. W. Freshfield should pay forthwith to the above-named plaintiff the sum of 1,000*l*., and that all the costs and expenses of the said submission and reference, and of the award, should be borne by the said T. M. Coombs and J. W. Freshfield. And the said W. J. Tate did, by his said award, find and adjudge the amount of the said costs and expenses other than and besides the costs and expenses incurred by and for the said T. M. Coombs and J. W. Freshfield, but including the costs and expenses to be paid on taking up the award by the party or parties taking up the same, to be 527*l*. 7*s*. 9*d*., which last-mentioned sum included the aforesaid sum of 379*l*. 10*s*. 9*d*., and also, 86*l*. 8*s*. for witnesses, and the above-named plaintiff's solicitors' bill for conducting the said reference, amounting to 60*l*. 19*s*.

A copy of the award was delivered to the said T. M. Coombs and J. W. Freshfield, who objected to the amount of the costs and proposed to pay the above-named plaintiff the 1,000*l*. awarded without prejudice to an application to the court to set aside the part of the award relating to costs. This was agreed to, and the 1,000*l*. paid to the plaintiff.

In Michaelmas Term, 1849, the agreement of reference was made a rule of the Court of Exchequer, and on the 5th of November, 1849, a rule was obtained in the last-mentioned court, calling upon the above-named plaintiff to show cause why the award of the said W. G. Tate, or so much thereof as related to the sum of 527*l*. 7*s*. 9*d*. therein mentioned, as alleged costs and expenses should not be set aside, unless the above-named plaintiff and the umpire and arbitrators would consent that the amount of the said costs and expenses should be referred to one of the Masters of that court, to be taxed and settled, the said T. M. Coombs and J. W. Freshfield, thereby consenting to such reference and undertaking to pay the amount as ascertained upon such taxation. And the court directed notice of the rule to be given to the above-named plaintiff, and to the said W. J. Tate and the above-named defendant and George Shorland, the arbitrators, all of whom were served with a copy of the said rule.

Cause was shown against the rule on Friday the 11th day of February, 1850, by the above-named plaintiff, and the said W. G. Tate and G. Shorland, but the above-named defendant did not appear, and took no part whatever with respect to the matter, and on the said last-mentioned day the Court of Exchequer made the following rule.

Upon reading the rule made in this matter of the 5th day of November last, and hearing Mr. Watson of counsel for the above-named plaintiff, James Fernley, Mr. Martin, and Sir John Bailey, of counsel for the above-named Thomas Merriman Coombs, and James William Freshfield and Mr. Henderson of counsel for William James Tate, the umpire, and George Shorland, one of the arbitrators named in the said rule, and by the consent of the said W. J. Tate and G. Shorland, it is ordered that the award of

3 Fernley or his attorney what, if anything, may appear
 eference to have been over-paid to them, or either of
 count of the said award and umpirage.
 of this rule was served on the said umpire and arbi-

~~~~~  
*demand—*  
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iance of the rule one of the Masters of the Court of  
 : proceeded to tax the costs, and upon such taxation he  
 led by the attorneys or agents of the said T. M. Coombs  
 Freshfield, and also the above-named plaintiff and the said  
 e and G. Shorland; but the above-named defendant did  
 on such taxation, either personally or by his attorney  
 On the 5th of June, 1850, the Master made the fol-  
 ificate:—I hereby certify, that having been attended by  
 ys or agents of the parties hereto, with the exception  
 itrator, Mr. Branson, who did not appear, and having  
 e several affidavits filed herein, I have taxed the several  
 ged as per account annexed, dated June 5, 1850.

owing is a copy of the account annexed, referred to in  
 rtificate of Master Dax, so far as relates to the arbitra-  
 tions.

|    |    |    |                   | Charges. |    |    |  |
|----|----|----|-------------------|----------|----|----|--|
| £  | s. | d. |                   | £        | s. | d. |  |
| 65 | 4  | 0  | ..... Branson ... | 109      | 6  | 0  |  |
| 63 | 4  | 0  | ..... Shorland... | 107      | 6  | 0  |  |
| 64 | 7  | 3  | ..... Tate .....  | 108      | 9  | 3  |  |

re was of opinion and found that the sum of 44*l.* 2*s.*  
 ple remuneration for the services of the defendant, as  
 ator as aforesaid, and that he had been overpaid 65*l.* 4*s.*  
 ese circumstances the plaintiff sued the defendant in  
 Court of Manchester to recover 49*l.* 10*s.* 11*d.* part of

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sufficient to maintain this action, inasmuch as the money was received, if at all, by the said W. J. Tate, the umpire, and not by the above-named defendant to the use of the above-named plaintiff.

The judge was of opinion that the payment made to Mr. Speakman was not to be considered as voluntary, being made to obtain possession of the award which the plaintiff considered of great value to him, and of which he could not otherwise obtain possession; and also, that the plaintiff had good reason to apprehend, and did believe, that the sum demanded by Mr. Speakman included not only all the umpires' and arbitrators' charges, but also other the charges and expenses attending the reference: and that the payment was made to Mr. Speakman under that apprehension and without a full knowledge of all the facts.

He was also of opinion, and found that the umpire, through Mr. Speakman, acted as the agent of the defendant in receiving the fee claimed by the defendant and paid by the plaintiff. And on the whole, the judge was of opinion that the plaintiff was entitled to recover back the amount claimed, and directed a verdict to be entered for that amount.

The question for the opinion of the court was whether, upon the facts and under the circumstances hereinbefore set forth, the verdict as entered for the plaintiff was right. If the court should be of that opinion, then the verdict is to stand; but if the court should not be of that opinion, then the verdict under their direction is to be set aside, and the plaintiff nonsuited.

*Couling* for the appellant, the defendant below.—This action cannot be maintained. Assuming the payment to have been involuntary, which is doubtful, and that the money was obtained, as it was by duress of goods, still if there was a legal consideration at the time the money cannot be recovered back: (*Atlee v. Backhouse*, 3 M. W. 642, 650, per Parke, B.; *Threlfall v. Fanshawe*, 19 L. J. 33 Q. B.) The latter case decided two things—that the arbitrator duly acted within the scope of his duty in assessing his own expenses; and, secondly, that those became a legal debt [WIGHTMAN, J.—Has it been decided that an action will lie against the arbitrator? *Watson* mentioned *Bates v. Townley* (2 Ex. Rep. 152.) WIGHTMAN, J.—That applies to a case where the award is taken up; but suppose the parties refuse to take it up? At all events he has a lien for the amount of his demand [WIGHTMAN, J.—Which you say cannot be reduced.] The court might have been different, if the submission had not given him the power of assessing the costs of the award. In every submission one of the terms is, that no action shall be brought against the arbitrator. In *Dossett v. Gingell* (2 M. & G. 870; 3 Scott N. R.) it was held that the court has no general jurisdiction over arbitrators as to the amount of fees charged by them, whether the reference be under a rule of court or not; and there is nothing in the case to warrant the *semble* which is added to the marginal note in that case. In *McArthur v. Campbell* (5 B. & Ad. 518

dy pointed out is an application to the court to compel  
rator to give up his award. [WIGHTMAN, J.—But you  
the finding of the arbitrator is conclusive as to the

The argument is, that there was a legal consideration  
ayment; and at law, therefore, it cannot be recovered  
f there is any remedy, it is in equity. [ERLE, J.—If  
rd is set aside, does not the consideration fail?] No;  
mission is the consideration.

n, for the respondent, the plaintiff below.—The judge has  
at this payment was not voluntary, and was made in igno-  
the facts. There is a distinction between lay and legal arbi-  
the latter are paid by known fees, but the former is entitled  
reasonable compensation for his services. All that he could  
whether his action is brought the day after the award or  
ation, is a *quantum meruit*. *Bates v. Townley* was  
ied on the ground that the action had been brought before  
, and, therefore, the plaintiff, who had taken up the  
ould not recover a moiety of the costs from the defendant.  
*ins v. Gordon* (3 Q. B. 466), an action was maintained by  
itratators for their reasonable costs. He also referred to  
*i v. Burne* (Gow. N. P. 7); *Fitzgerald v. Graves* (5 Taunt.  
*iller v. Robe* (3 Taunt. 461); *Barrett v. Parry* (4 Taunt.  
n *Musselbrook v. Dunkin* (9 Bing. 605), the court referred  
Master the propriety of an arbitrator's fee. *Robinson v.*  
*m* (6 M. & S. 276) also decides that an arbitrator is not  
own fee; he is not to be final judge in his own cause.  
ard of a gross sum to the arbitrator is never binding:  
*v. The Globe Insurance*, 14 L. T. 251; *Turner v. Dean*,  
Rep. 837, were also cited.)

ng, in reply.

ITMAN, J.—In this case the plaintiff has been compelled  
a sum which may now be taken as unreasonable and  
nt to the extent of 49*l*. 19*s*. 11*d*., in order to take up an  
which he could not have got without making the payment.  
ind as a fact that he had paid without full knowledge of  
mstances. According to all the facts stated in the case,  
nent may be considered to have been made under duress,  
oluntarily. The court of C. P. has decided that it  
ummary jurisdiction over an arbitrator, to compel him to  
an overcharge. Then will an action lie to recover it?  
d not refer to the decisions as to duress, because it is said  
action will lie, inasmuch as there was a legal consideration  
here; and the terms of the submission were relied on, as  
he arbitrator complete power to make this decision. This  
it, however, does not appear to me to be well founded, for  
se only applies to give the arbitrators and umpire power  
o whom, by whom, and in what proportion the expenses  
be paid, but not to fix, without limit or restraint, what  
be the amount of those expenses. They have, however,  
amount which a Master and a jury have declared to be

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excessive, and, under these circumstances, there can be no that the action is maintainable.

ERLE, J.—I am of the same opinion. The defendant has exercised the discretionary power he possessed of doing by and to whom the expenses were to be paid, by himself 100 guineas, or 49% more than he was reasonably entitled to. The plaintiff has paid this unreasonable demand, but the fact of payment was not here conclusive against him. *Ashtown v. Wainwright* (2 Q. B. 837), decides that the owner of goods wrongfully a sum of money to get them back, may recover the sum; and I think that the arbitrator had no power absolutely to fix the sum to be paid to himself; that would be to make the judge in his own cause; and *Fitzgerald v. Graves*, *Miller v. Musselbrook* v. *Dunkin*, all show that he cannot decisively fix the sum. So in Mr. Watson's book, p. 108. It would be an anomaly in the law to allow a person respecting whose labour there is a settled scale of remuneration, to be able thus absolutely to fix it, and an award which did not would be bad; and certainly not the case. Whether, after the money has been paid, the party can recover it back, has not been before decided here the plaintiff has brought it to the test of decision, and the right to recover seems to be warranted by the settled principle of law. The judgment of the court must be for the plaintiff.

*Judgment affirmed with costs.*

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*Alleged misconduct of a County Court Judge—Practice.*

*may be corruption without a bribe, and there may be a misdemeanor committed by a judge without malice, or without seeking a private advantage. A wrong act committed with a bad motive is not a crime.*

*On the facts, as stated and answered, the court acquitted Mr. Amos of charges of corrupt and oppressive conduct in the discharge of his*

*judicial duties. It was held that frequent sittings of the County Court should be holden, so as to avoid so great an accumulation of business in one day.*

*It was also held that it is contrary to law, and the practice ought not to be allowed by the judges of the County Courts, for an attorney to practise in those courts as an advocate, taking briefs from other attorneys.*

MR. AMOS moved for a rule to show cause why a criminal information should not be filed against Mr. Amos, the judge of a County Court, for misconduct in his office. He founded this upon an affidavit made by a person named Alder, to the effect that he was a person in the service of a Mr. Yeohat, and that he had a claim for some money due to him from Mr. Yeohat, also for services, and that he instituted a suit in County Court over which Mr. Amos presided, in order to recover that money. He took out a summons on the 11th of May, and paid the sum of 1*l.* 4*s.* for the summons, and afterwards the sum of 2*l.* 0*s.* 6*d.* for what were called hearing fees, and he also paid an attorney to attend for him. The case was called for hearing, when the defendant's attorney applied for an adjournment, on the ground that the defendant desired to further and better particulars. The demand for



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by the defendant to get the case adjourned, as he pretended one of long and involved accounts running through a s years. The plaintiff resisted this attempt, and endeavou convince Mr. Amos, the judge, that the demand was a simp and that the case could easily be tried; but, in spite of his the judge adjourned the cause till Friday, the 14th of . The plaintiff then changed his attorney, and the new attor structed counsel on the plaintiff's behalf. Upon the partie attending before the judge, the counsel for the plaintiff wa for whom he appeared, and whether he was instructed attorney, and the counsel answered in the affirmative. counsel then opened the case, and called a witness, and at i judge said the set-off could not be gone into, as it was not i The defendant was then tendered as a witness, and was ex He was cross-examined by the plaintiff's counsel at some and before the cross-examination was finished, the judge posed, and ordered the case to be adjourned till the fo Monday. The plaintiff in vain protested against this adjou but the judge said he would adjourn the case, though it then more than a quarter past one o'clock in the day plaintiff's counsel then requested that a different day sh named, as he must be in Exeter on the Monday, and co attend to conduct the cause which had been entrusted . The judge then adjourned the case till Friday, the 9th o The counsel was again duly instructed, but, from what had occurred, and from the manner in which the judge had i questions, he thought fit to have the attorney present, to the judge on the point of his having been properly inst On the day appointed the parties again attended, a plaintiff had again to pay the court fees. The counsel wa asked whether he was instructed by an attorney, and i the judge that he was so instructed. The judge th that he should adjourn the case to the end of the da also put questions to the attorney, asking him whether himself prepared the brief. The cause was then called i the judge said that he had forgotten what had occurri former occasion, for that he had not taken any notes, and fore had nothing with which he could refresh his memor therefore requested the plaintiff's counsel to recall the i This was done, and the evidence was given over again, i length the judge said, "I cannot keep other people wai shall adjourn this case." That was at a quarter after one in the day. He was intreated to let the case proceed; but he would adjourn it to the end of the list. The plaintiff o to this; his witness had been heard; a little time would fin case; and he protested against having it so adjourned—th so, as there were 150 cases on the list, and he told the jud he was a working man; that he could not afford to com from day to day, leaving his master's employment, and t must abandon the claim altogether, if this system of adjou

ted in. The judge said he could not help that, and he turned the case to the 10th of June. That was an order for the hearing of causes, and the business would be the same any other time, and the same causes would be again heard as requiring an adjournment. These adjournments occasioned the plaintiff very considerable expense, he paid 14*l*. in what had, up to this moment, proved to be the labour to recover less than 17*l*. He should not be able to get the money requisite to go on, and he should be reduced to the order to meet these needless and heavy expenses occasioned by the attempt to recover, in these courts of cheap and easy justice, a sum that was lawfully due to him. He complained that by these adjournments he had lost all the benefit of the examination of the witnesses, for the judge did not take down the evidence as the witnesses said, saying that he should recollect it, and, on being asked to put it in writing, refused to do so, and said that he would use that would be made of it. The judge had tried to force the parties to incur the expense of an arbitration. All these things, the learned counsel contended, were actionable, and this denial of justice, whether it proceeded from corrupt motives, or only from negligence and indifference on the part of the judge to the proper discharge of the duties of his office, the result was equally blameable in respect of the public, as it was to the suitor. He had now stated the substance of the affidavit of F. W. Arundel Alder, and that affidavit was fully supported by another made by Anthony Alder. The plaintiff had been obliged to require delay; he was always present at the trial, and he had proved his own case twice over. There was nothing, on his part, to which the judge could point as justification for the vexation and expense. The judge had been particular in asking whether the counsel for the plaintiff was instructed to argue the case. The person who appeared for the defendant was not instructed; he was not a member of the bar, nor the counsel for the defendant, but had been instructed by another person who had himself been instructed by the defendant; his name was Herring, and he had taken his instructions from the defendant's attorney. As these questions had been put to the counsel, he asked questions about Herring, and at last the defendant was asked whether he would consent to allow Herring to appear for him, which, under the circumstances in the case, he consented to do. The judge again and again pressed that the defendant's wish should be agreed to, and that the matter should be referred to Herring; and, on one of these occasions, used the expression, "Perhaps the plaintiff will find it better to agree to the defendant's proposition." It appeared, in fact, that it was the duty of the court for the clerk of the court to sit as arbitrator, and to receive fees for trying what the judge was appointed and

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CAMPBELL, C. J.—We have no jurisdiction here over the judge on the ground that he has acted corruptly.

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*Carter* said that corruption was not restricted to money, and that a man might act corruptly, though he receive money, if, in order to save himself trouble, he neglect to perform his duties. That had been settled so clearly, that two men took their master's oats, and gave them to their horses, a conviction against them for the larceny of the oats had been maintained, on the ground that what they did, being to give the horses a good coat, without their having the same in cleaning them, was, in law, done *hacri causa*, and could be a charge of larceny.

LORD CAMPBELL, C. J.—The most convenient way will be for you to show cause, so that the facts may be fully before us.

*Rule to show*

*Bovill* now showed cause against the rule.—The charge against Mr. Amos was that of corrupt and oppressive conduct in the discharge of the duties of his office. A graver charge could have been made; but, in proceeding to show how unfounded it was, even as the affidavits were concerned, he must observe that one charge had been made in the speech of the learned counsel for the defendant, which was not to be found in the affidavits of the applicant. He should, however, pass by this additional and unwarranted charge, and proceed to the others. The first of these was that Mr. Amos had, by a series of adjournments of a case brought before him in the County Court, endeavoured to force the case into a reference. This general charge branched itself into several minor ones, but this was the chief. The plaintiff had brought an action for a balance of wages, and the case came before Mr. Justice Maule on the 11th of January. The defence was a matter which involved many and complicated accounts. On the first day the defendant complained that he had no particulars of the account. This proved to be the case, and, therefore, according to the practice of the court, the case was adjourned. No just cause could be made as to that adjournment, for it was the fault of the plaintiff himself. The case came on again on the 14th of February, and the plaintiff then complained that, though he was willing and anxious to try the case, the judge again adjourned it: he insinuated that this adjournment was made with the intention of forcing him into agreeing to a reference, to which he was not willing. That, however, was not the fact. Mr. Amos's affidavit stated that on that occasion the defendant's attorney suggested that there should be a reference, as there were long accounts between the parties, who had been acting together on terms of great intimacy for a series of years, whereon the plaintiff's attorney expressed his concurrence in the proposal, as most conducive to the plaintiff's interests, but said that his client objected to the reference. A conversation between the parties followed, during which the business of the court was suspended, and then the defendant (Mr. Amos) suggested that there should be an adjournment of the cause, for the purpose of enabling the parties to

the adjournment, the plaintiff had dismissed him, and another. The case then again came on upon the 14th of when the plaintiff, for the first time, attended with counsel, plaintiff complained that an attempt was again made to reference: he did not say by whom, but left it to be that the attempt was made by the judge, which was untrue. The reference spoken of was objected to, and the id that the plaintiff was entitled to have his cause tried if ed on it. The cause was begun, and it went on till a past one o'clock, when the judge, in order to proceed with as of hundreds of working people, who were in waiting, se causes were capable of being decided in a very short d who, of course, complained of being needlessly kept again adjourned the cause. The cause was conducted in a ix manner, and, having occupied so much of the time of the e judge, for public reasons, was compelled to exercise the iven him by the 81st section of the County Courts Act, ljourn it. There were at that time several witnesses to ned, and besides them there was on the table of the court ' books and papers, sixty-five weekly pay-sheets being em, which the judge understood would be produced in , and which could not be examined in any but a consider- e of time. The fact was that the defendant had been largely in the building business, and the plaintiff was his ial clerk, and the accounts between them spread over ears. Mr. Amos proposed, however, that the cause e adjourned only from the 14th to the 17th of March, could devote his time to it, and could finish it, for on there, were but three causes entered for trial, whereas 4th there were nearly 200. Under such circumstances, es of the Superior Courts had often adjourned causes of th rather than keep the great body of suitors waiting

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perly. Well, then, he proposed to adjourn the case to the 9th of March, but that proposal was objected to, because it was not convenient for the plaintiff's counsel then to attend. The defendant yielded to this objection, and now was censured both by the plaintiff and his counsel for having done so. The adjournment was finally fixed, as the plaintiff's counsel wished to go to the city for the 9th of May. That was the real reason for the adjournment, but an insinuation was now thrown out that the defendant was for the purpose of corruptly forcing a reference—an insinuation which every fact in the case contradicted. The case was brought in court on the 9th of May. Counsel again appeared for the plaintiff, but the defendant's attorney took an objection, under the 91st section of the act, that counsel was not instructed by the court. Mr. Amos heard the objection, and required counsel to show that the counsel was so instructed. The plaintiff's attorney was not present, and Mr. Amos offered to adjourn the cause to the 14th of March, but he added, that if it should turn out that there was an attorney who had instructed counsel, he would make the defendant pay all the costs of the adjournment. Nothing was said by the court fairer than that. He did adjourn the case accordingly, and the plaintiff's counsel handed up to the judge a written declaration, which was now lost, for a subpoena to compel the defendant's attorney to appear. What was the meaning of that—

PATTESON, J.—That objection about the instructions to counsel had been taken before, on the 14th of March, when Mr. Amos said that he was instructed, and the cause went on. The doubt was whether he had been duly instructed, but whether the perjury had been imposed on him was really an attorney—whether, in fact, he had not been imposed on.

Bovill said, that might be so, but at all events the objection was taken, and Mr. Amos's affidavit showed what had happened. Mr. Amos, finding what sort of disputes arose, and how this case was likely to occupy the time of the court, offered to adjourn half-an-hour earlier to hear it. When the parties came before the court on the 10th of May, and the question of the instructions was renewed, he questioned the attorney as to preparing the declaration, and was answered that the attorney had not prepared it. He was not satisfied that the attorney knew the contents of it, and the plaintiff's counsel objected to Mr. Herring acting as the defendant's attorney, and it appeared that Fisher was the defendant's attorney, and as he was to be called as a witness, he was instructed Herring, on which the judge asked the defendant whether he was willing Herring should appear as his attorney, and the defendant said he was, and the cause was then ordered to proceed.

LORD CAMPBELL, C. J.—What progress had been made in the cause on the 14th of March?

Bovill answered, to the end of the plaintiff's case, and to the examination of the defendant, on his own case. The defendant did not attend on May 10 at the half-hour earlier than the

the court, otherwise the case might have been got and when they did attend, the judge was compelled adjourn it to the 10th of June. In the meantime the application was made to this court. The only other against Mr. Amos was, that on the 10th of May he the parties again to go through the case, on the ground did not recollect the circumstances, and it was charged as in him that he did not take notes of the case, and another of his, that he knew what use would be made of his had been referred to. The meaning of that observation that which had been attributed to it, but that the judge the parties, if they intended criminal proceedings against him, to employ persons to take notes for them, for that he should have his notes called for to sustain a prosecution for perjury there was no judge whatever who would not feel the force of the objection, for none ever took such verbally accurate notes as to make him feel justified in swearing to the particular expression of witness through a long examination and cross-examination: he had now gone through all the charges. He thought the case was all completely answered, and that the court would feel that Amos had most unjustly been subjected to the pain of a complaint being made against him, and that the rule ought to be discharged.

The judge, in support of the rule, said that much stress had been laid on the point of the counsel for the plaintiff; but he could not say that the court, that in what he had done in this case he had been actuated by no personal feelings against Mr. Amos; for, he thought Mr. Amos had needlessly listened to the counsel about the sufficiency of the instructions, he was willing to say that he had no complaint whatever to make of Mr. Amos' treatment of himself personally. He might here mention, that Amos was wholly mistaken in his assertion that an application had been made by the plaintiff's counsel for a *subpœna* to compel the attendance of the plaintiff's attorney. The paper was only a request to know whether Mr. Amos would attend, in order to secure his attendance, as there was no necessity for him to attend, he should be served with a subpoena as a witness. As to the other parts of the case, it is to be said to him that the complaint was not answered. The case was to have been adjourned when it was part heard. The books and papers had in reality nothing to do with the case, as they were not called for by the plaintiff, and they were not in the hands of the defendant. The case had proceeded so far that it could not have been finished, and the adjournment was a wrongful, and a vexatious proceeding. It was entirely wrong to press for a reference in such a case, where the case was a simple demand for eight weeks' wages, and for the costs, and where there was no notice of set-off, and where no cross-demand could be taken into account. The judge might easily have determined the case,

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and was bound to do so. But he allowed all kinds of evidence when raised by the defendant's attorney; and there could be no doubt that in these courts there was a kind of understanding between the judges and the attorneys, or, at least, such of them as were sitting constantly in the court, were ready to conform in their decisions to the judge's opinions, and to flatter his pride and self-interest. The objection about the instructions was made, and apparently has been disposed of, yet it was allowed to be renewed, without proof of counsel having received instructions was required as much strictness as if it was a fact in the cause itself. On the other hand, every facility was afforded to the person who acted as the attorney for the defendant, though it was proved that he was not the defendant's attorney, but was an attorney practising in the court as a barrister, and receiving his fees from other attorneys.

PATTESON, J.—The case here was that the defendant's attorney was to be a witness; but in ordinary cases one cannot lawfully instruct another attorney to appear for him.

Carter.—It certainly behoved this court to watch its proceedings with jealousy. These attorneys who thus practise in the County Courts, were not the most unexceptionable characters in the profession. Respectable attorneys would not attack the courts if they could avoid doing so, and when, in obedience to the wishes of a particular client, they did so, they conducted the particular case in which they were engaged, and then left it to the judge. The judge was said to have exercised his discretion in matters of adjournment; but discretion did not mean tyrannical judgment applied according to just and well-known rules. What was the consequence of a practice of the judge in his notes? It was this, that the case was all heard over again at the time which had been at first employed upon it was thus wasted. The learned counsel went through the other parties' case, and contended that the judge of the County Court vexatiously imposed great expense and trouble on the parties, that corruption might exist quite independently of any advantage; and that the judge here had shown such a disposition to consult his own ease, at the expense of the suitor, as to justify this application against him.

LORD CAMPBELL, C. J.—This is an application for information against Mr. Amos, the judge of the Middlesex County Court, on the ground of corruption in the discharge of his duties. It is only on the ground of corruption that we have criminal jurisdiction; and if it had been established that he had been guilty of corruption in his office, this would undoubtedly be the proper tribunal to which the application should be made. It is the only tribunal to put the case in a proper form of law, so that the guilty party might be punished. There is no doubt that there may be corruption without a bribe, and there is no misdemeanor committed by a judge, though he does not show any premeditated malice towards an individual, and though

a pecuniary advantage. If he does that which is wrong and motive, he is guilty of corruption. But we must content, whether he has done what is wrong, and, secondly, did *nalo animo*? In this case it is not made out to my satisfaction that he did what was wrong; and I am clearly of opinion whatever he did he was free from all bad motive. The charge against him is, that he, with a view of escaping from the trouble of trying the cause as a judge, oppressively used, by postponing the cause from time to time, to endeavor to force the parties to a reference. Let us see how this is substantiated by the facts. The case comes on first for Mr. Amos on the 11th of January. On that occasion he properly adjourned the hearing of the cause, because the pleadings were clearly defective. The defendant had not been apprised of what had been the nature of the demand against him had he been put in a state to meet it. The particulars set forth in these words, "Balance of eight weeks' wages, 3l.; making together, 17l. 17s." These particulars are without dates, and did not furnish to the defendant any information by which he might be able to meet the claim on the day of the trial. The judge, therefore, most properly yielded to this application for further particulars, and on that ground adjourned the cause. On the 14th of February the case again came before the court, and it was suggested that this case, from the nature of it, might be referred to a reference, for not only would it lead into long matters of fact, but might be followed by cross-demands and fresh matters of fact. I differ from the learned gentleman who has just been heard in thinking that it was necessarily a fit thing to disallow the proposal for a reference, because there had not been any notice of a set-off. If there had been such a notice, and the defendant had settled the whole demand, it was his duty to do so. In such matters the judge of the County Court has an advantage over a judge who sits in the Superior Courts with a complicated accounts cannot be taken by a judge with a view to the County Court judge may by himself, with patient attention, come to a right conclusion. But it was not in the case of Mr. Amos to do so in this case, for there was no notice of a reference before him. It might therefore have been for the benefit of the plaintiff, as well as for that of the defendant, that there should be a reference by which an end might be put to the matter; for though the plaintiff might obtain a victory for the moment, what would that avail him if he was afterwards liable to an action for that, or even a larger amount, which would require him to refund what he had got, with costs? It was therefore the duty of the judge not only to express his opinion in favor of a reference, but to encourage the suggestion of one. He did not insist on it as a judge by merely giving his sanction to the suggestion. Then the adjournment took place on the 14th of February, with the entire approbation of the plaintiff's attorney, the attorney who then represented him, and

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who then said that the case was a fit case for a reference now come to the 14th of March, when the case was again on, and when Mr. Carter appeared as counsel. On that case began and lasted several hours, and at one o'clock, it being expected still to last a long time, the judge, in the of his discretion, thought it would be fit, with a view interests of the other suitors of the court, that it should be adjourned, there being a great many other cases standing and a great many parties and witnesses in attendance. I express my regret that more frequent meetings of the Court should not be held, if more frequent meetings are made. It only meets once a month, but I cannot say, for I am in a condition to judge, whether another practice might not be reasonable; it is not in my province to say anything on that subject. I may, however, observe, that if fewer cases were argued for one day, one that was very long might more certainly be disposed of. But nothing has been put before me to show that there was any breach of duty in respect of anything done in the court on the 14th of March, for, when one o'clock arrived, it was likely that the case would still last a long time, it is reasonable that the judge should exercise the power given by the 81st section of the first County Court Act, which gave him to adjourn any court, or the further hearing of a cause in the court, in such manner as to him (the judge) may seem. He has by the statute the most ample discretion to adjourn the hearing, or the further hearing of a cause, a provision which was intended to contemplate any case between its commencement and judgment. Then what did the judge do? This was on the 14th, he said he would hear it on Monday—that Monday he dedicated to the hearing of this cause. Why did he not hear it that day? Because Mr. Carter was on the Western Circuit, and was not convenient for him then to attend. I do not think there is any blame to be attached to Mr. Carter for withdrawing at that time for a longer adjournment; but I do think that it was rather too much, after the delay granted to a learned gentleman of the bar, that that learned gentleman should taunt the court with the delay, and with having, by that delay, forgotten the cause due to justice. Well, then, the judge was willing to adjourn the cause from the Friday to the Monday. It was not adjourned, for it would have been inconvenient to the parties and counsel, but it was adjourned to the 9th of May. There is nothing wrong in all this. Then we come to the 9th of May. On that day Mr. Carter appeared as counsel for the plaintiff, and was objected by the defendant's counsel that Mr. Carter was not instructed in the cause by an attorney. The question was so instructed required to be decided. The Legislature requires that no barrister should appear in such a court being instructed by an attorney; for, without that, I think the order to which I belong, and to which I am most affectionately attached, would lose much of its dignity and usefulness.

e, I entirely concur with what fell from my brother Pat-  
 at, for an attorney to practise in those courts as an advo-  
 to take briefs from other attorneys, is wholly contrary  
 and such a practice ought not to be allowed. Well, then,  
 done on the 9th of May? Mr. Amos swears, and what  
 seems to be most highly probable, that, the objection  
 de, he required evidence of Mr. Carter being instructed,  
 this evidence not being satisfactory, he adjourned the  
 t fresh evidence might be produced. I do not know  
 this was ever done before, but I think that this was the  
 use. Now then we come to the 10th of May. On that  
 hearing of the case was resumed. The judge had agreed  
 f an hour earlier to take it, but the parties did not appear.  
 was called on, and proceeded till one o'clock; there was  
 respect of its lasting many hours—it is so sworn in the  
 , and such appears to have been the probability of the  
 here were many witnesses and parties, and the cases  
 en stood in the paper required to be disposed of. Many  
 were not such as are tried at Nisi Prius, but were mere  
 without dispute as to amount, and in which time of  
 only was to be settled. It was most desirable that these  
 e disposed of, and Mr. Amos did that which cannot be  
 ed of, when he said he would not go on with this case,  
 ng first disposed of the others, would sit till night to hear  
 en it was stated that it was inconvenient to keep counsel  
 He offered to put off the hearing to a fixed hour; but  
 iff's counsel declined that offer, and said he could not  
 at night. The blame of that delay is not owing to Mr.  
 There was another ground on which this rule was applied  
 , being requested to take down the evidence, he declined  
 That has been fully explained. He took what was  
 but he wished to guard against its being supposed that  
 own the evidence in such a way that it could be used in  
 ment for perjury; he wished to discourage a proceeding  
 highly reprehensible—that of summoning a judge to  
 ase of that sort. On these grounds are we to grant this  
 information? Mr. Amos says that he was ready and  
 o try this case at such times as were consistent with a  
 d to the rights and interests of the other suitors of the  
 l that no judgment was made by him for the purpose of  
 himself from the trouble of hearing and disposing of the  
 r that of compelling the plaintiff to agree to a reference, or  
 improper motive whatever, but solely for the benefit of  
 s of the court, and for the proper discharge of the public  
 oed in him. Having attentively and carefully listened  
 as been sworn on both sides, I think that what Mr.  
 thus declared is true. I have no reason to suppose that  
 l to get rid of the trouble of hearing the cause, and I  
 t the complaint is answered, and that the rule must be  
 d, and with costs.

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 ANDREW AMOS.  
 —  
 1851.  
 —  
*County Court  
 Judge—  
 Alleged  
 misconduct—  
 Practice.*

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PATTESON, J.—I entirely agree with the Lord Chief Justice. It is not necessary for me to go into the particulars of the case. There was no pretence whatever for this charge—none for saying that the judge had done wrong—certainly none for saying that he had acted with a wrong motive.

COLERIDGE, J.—I am of the same opinion, and think that it is hardly necessary for me to do more than declare my concurrence. Yet, at the same time, from the importance of the case, and, I am glad to say, from the rareness of these complaints, it may be proper that each member of the court should state the reasons for his opinions. The substance of the charge is that Mr. Amos, being a judge, and being desirous of getting rid of a long case, and to avoid the trouble and irksomeness of trying it, adjourned it improperly and oppressively, because the plaintiff refused to accede to his suggestions of a reference; and, in addition, that he was guilty of ill-treatment of the counsel of the plaintiff, and showed undue favour to the defendant, whose attorney was willing to refer. If that charge was made out, or if the denial of it was imperfect and unsatisfactory, that would justify calling on this court for a grant of interference. It appears to me that the charge has entirely failed—failed substantially as to any misconduct, or any undue or unwarranted exercise of discretion; and not only has it substantially failed, but it has wholly, entirely, and without a shadow of exception failed. It is probable that the judge was desirous that the case should go to a reference, and this might be most honestly and wisely his wish in order to prevent future litigation. I use the word “substantially” when speaking of the conduct of Mr. Amos with regard to the case itself, but I have some doubt whether he did behave with exact equity in the manner in which he dealt with the question of the retainer of the counsel for the plaintiff, and of the attorney who appeared for another attorney, who was attorney for the defendant. But, though I do express this doubt, yet a great deal of explanation of the matter has been offered, and I believe that he acted as an honest and discreet judge would do. I speak now only of my impressions, but my mind might be open to a different conclusion if I knew all the circumstances, all the collateral matters more fully than the affidavits enable me to know them. There are other matters which have been urged with a great deal of force by Mr. Carter, but on the whole I am clearly of opinion that there is not the slightest foundation for the charge of want of integrity which has been brought against Mr. Amos.

Mr. JUSTICE ERLE concurred.

*Rule discharged, with costs.*

## COURT OF COMMON BENCH.

May 13, 1851.

CHARLWOOD v. ELLIOTT.

*t—9 & 10 Vict. c. 95, ss. 128 and 129—Practice—  
Suggestion—Affidavit.*

*a suggestion to deprive a plaintiff of costs under sections of the County Courts Act (9 & 10 Vict. c. 95), stated "that the time dwelt, resided, and carried on his business at county of Middlesex, and within the jurisdiction of the of Middlesex, and that during the period within which sold, and at the time of the commencement of the suit, the and carried on his business at B. in the county of d within the jurisdiction of the County Court of Middle- t at the time of the commencement of the action, the less than twenty miles from the defendant, that the cause , and the goods were delivered wholly within the county of d within the jurisdiction of the County Court of Middle- t at the time of the commencement of the action the lt and carried on business within the Brompton district of urt of Middlesex, and that the greater part of the goods d delivered to him at his dwelling-house, within the rict of the County Court of Middlesex."*  
*to entitle the defendant to a suggestion to deprive the ts.*

*n action of debt for goods sold and delivered, com- the 28th June, 1850, and tried before the Secony of London, on the 25th April, 1851: verdict for r the full sum claimed, 8*l*. 3*s*. 4*d*. Judgment was t day, and Maule, J., ordered stay of proceedings in order that defendant might apply for a*

*i a former day, obtained a rule calling on the w cause why the judgment should not be set aside, ll should not be carried in and a suggestion entered rive the plaintiff of his costs. The affidavit of the which the rule nisi was obtained, stated, "That the he city of London, being the judge who tried the t certified that it was fit to be brought in that e plaintiff is a seedsman, and at the time of the ods, and the time of the commencement of the resided, and carried on his business, and still does ad carry on his business, at No. 14, Tavistock-row, , in the county of Middlesex, and within the juris- County Court of Middlesex; and that during the*

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*Practice—  
Affidavit—  
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period within which the said goods were sold, and at the commencement of the suit, the said defendant dwelt and carried on business at Brompton, in the county of Middlesex within the jurisdiction of the County Court of Middlesex long before and at the time of the commencement of the plaintiff dwelt less than twenty miles from him, the defendant that the cause of action accrued and arose, and the goods sold and delivered wholly within the county of Middlesex within the jurisdiction of the County Court of Middlesex that, at the time of the commencement of the action, the defendant, dwelt and carried on business within the Brompton District of the County Court of Middlesex, and that the part of the goods, for the price of which the action was brought, were sold and delivered to him at his dwelling-house, within the Brompton District of the County Court of Middlesex," &c.

*Wordsworth* now showed cause.—The first question is, whether there is any such court as that described in the defendant's affidavit; and the next, whether it is not shown that the goods were ordered and supplied in the jurisdiction of the court in which the defendant dwells. With respect to the first point, I say no such court exists as the County Court of Middlesex, the effect of the 1st and 2nd sections of 9 & 10 Vict. c. 95, is, with that of an Order in Council, set out in the plaintiff's affidavit, is to give existence to certain courts in the metropolitan area for the recovery of debts under 20*l.*, which are to be called by the name of the district over which the several jurisdictions are exercised; for instance, as the Brompton County Court of Middlesex; and I say there is no such court as the County Court of Middlesex, or any such court as the Brompton district of the County Court of Middlesex, as stated in the affidavit on which this rule was made. The proper name should have been "The Brompton District Court of Middlesex." The defendant must show that there is such a County Court as he has described, and that the plaintiff might have sued there, neither of which has here been done. It is perfectly consistent with this affidavit that the Brompton County Court of Middlesex includes within its ambit some part, but not within the jurisdiction of the court, and the defendant has not positively shown that he lived within the jurisdiction of the Brompton County Court of Middlesex. But assuming that the description of the Court be correct, it is not true that the cause of action arose wholly or in some material part within the jurisdiction of the court within which the defendant dwelt or carried on business at the time of action brought.

JERVIS, C. J.—That is matter of fact, and not a ground for suggestion.

*Jones*, in support of the rule.—The question is, whether the cause of action arose within the jurisdiction of the court in which the defendant dwells. We have stated that the plaintiff resides within the jurisdiction of the County Court of Middlesex, that the plaintiff resides within its jurisdiction, and that at the time when the goods were sold, and

cement of the suit, the defendant dwelt and carried on his at Brompton, in the county of Middlesex, and within the jurisdiction of the County Court of Middlesex, and that plaintiff is less than twenty miles from the defendant. That is surely

[CRESSWELL, J.—You have to show that the jurisdiction is to the part where the defendant dwells. Read any part of the affidavit which shows that the goods were delivered within the Brompton County Court of Middlesex.] The affidavit shows the goods were delivered within the Brompton district of the County of Middlesex. It also states that the cause of action accrued within the County Court of Middlesex, which must come within the Brompton County Court of Middlesex; for it must be taken that the jurisdiction of the County Court of Middlesex is co-extensive with the ambit of the court. It has not been shown by the defendant that the jurisdiction is not co-extensive with the ambit of the court, and the court will, therefore, presume it is. No one can doubt that the court we describe is the same as the court described in the Order in Council. A *prima facie* case has been made out by the defendant's affidavit, and that is sufficient to entitle him to this rule. [CRESSWELL, J.—Looking at the defendant's affidavit, it is stated that the plaintiff and defendant resided within the jurisdiction of the County Court of Middlesex.] I shall contend, if need be, that all these district courts are branches of one County Court. The plaintiff has an opportunity of showing that there is a district within the Brompton County Court of Middlesex, which is not within the jurisdiction. [WELL, J.—The question is, whether we are able to take notice that the jurisdiction is co-extensive with the ambit of the court.]

If it can reasonably be inferred that it is so, the court has a right to enter a suggestion. The plaintiff would not be prejudiced thereby; he can traverse the suggestion. For reasons it is submitted that this rule should be made absolute. [S. C. J.—I am of opinion that this rule should be made absolute.]

It is unnecessary to enter on a discussion of the last suggestion made by Mr. Jones. I admit that during the discussion I had considerable doubt whether Mr. Jones was entitled to have the rule absolute; but he has convinced me to the contrary. We are bound only to take a fair, proper, and common-sense view of the statement in the affidavit; and, doing so, I think sufficiently certain where it says that the defendant resided in the Brompton district of the County Court of Middlesex, to require no averment to the contrary in the affidavit filed on behalf of the plaintiff. This rule for a suggestion must, therefore, be made absolute.

[WELL, J.—I am of the same opinion.]

[JAMES, J.—I also am of like opinion. It is much to be regretted that where it is so easy to frame a clear and certain statement the court should be compelled to resort to astuteness in order to give defendant his due. The only way in which it can be done is by coupling together the two averments on which the

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defendant has a right to rely. It is quite consistent that residence of the defendant may be within the ambit of County Court, and yet not be within its jurisdiction. But is negated by the other averment, which shows that the action did arise within the jurisdiction of the County Court Middlesex.

**TALFOURD, J., concurred.**

**Rule about**

**OXFORD CIRCUIT.**

**GLOUCESTER SPRING ASSIZES, 1851.**

(Before TALFOURD, J.)

**REG. v. DUTTON.**

***Evidence—Practice—Subpoenaing County Court judge.***

*There is nothing to exempt a judge from the duty of obeying a su but the Superior Courts will discourage the practice of subp the judges of the County Courts to produce their notes to proo took place before them on the hearing of any plaint. (a)*

**J**OSEPH DUTTON, a butcher, was indicted for wilful corrupt perjury, committed in the County Court of Chichester, on the 16th of April last.

**Cooke and M<sup>r</sup> Mahon** appeared for the prosecution.

*Symonds and Evans* for the defendant.

**When the case was called on,**

Mr. Francillon, the judge of the Gloucestershire County Court, said he had been subpoenaed in this case to give evidence of what passed at the trial before him, and he thought it his duty to call the lordship's attention to the circumstance, as it would be inconvenient to the public if he were obliged to be attending assize courts when possibly he ought to be holding his own court.

TALFOURD, J.—There can be only one opinion on the subject. It must be most inconvenient to subpoena the judges of the County Courts for the purpose of supplying evidence which can be equally well given by any one else who was present. If a practice were to grow up it would lead to great inconvenience not only to the judges, but to the public. At the same time being aware that the learned judge of the County Court of

(a) And see Lord Campbell's opinion, expressed in his judgment in *Reg v. Ameer, ant.*

strict had an objection to attending here as a witness, I have referred with my brother Patteson on the subject, and we are of opinion that there is nothing in the law of evidence which would exempt the learned gentleman from the duty of obeying the subpoena, though it is plain that if, through the pressure of his social business, he had been unable to attend, no court would make an attachment against him. As he is here, however, in obedience to the subpoena, his evidence can be given; but at the same time I must add that I had the entire concurrence of my brother Patteson in saying that this must not be drawn into a precedent. The very same principle is as applicable to the judges of the Superior Courts as to the judges of the County Courts. There is no principle which would apply to Mr. Francillon that would not equally apply to myself and my brother Patteson. It would be most inconvenient if the judges of the Superior Courts or the County Courts were to be obliged to attend in different parts of the kingdom, not only in cases of perjury, but in cases of new trial, to produce their notes of the evidence given before them; and if such a course were to be extensively practised it would be the duty of the Legislature to provide a remedy.

*Cooke* said, that several cases of perjury in County Courts had occurred on this circuit, and no such objection was made. Indeed, judges of the Shropshire and Herefordshire County Courts willingly attended on several occasions, considering that they were furthering the objects of the County Courts and interests of justice by suppressing perjury in them. As other judges never protested, he thought that Mr. Francillon would be delighted to do so. But, henceforth, he should try, in this county at least, to give some other evidence; and the observations which had just been made from his lordship would serve as an excuse for not summoning the judge of the County Court.

Mr. Francillon said he had protested at former assizes against being called to prove what occurred before him as chairman of sessions, and the protest prevailed. In the present case he had taken notes only of the evidence of the plaintiff and of the defendant, and not of the other witnesses, as he thought it more important to watch the demeanour of the witnesses than to take notes of their evidence.

In a short time afterwards,

*Cooke* said, that in consequence of the intimation from his lordship as to the inconvenience of calling Mr. Francillon, and of hearing that Mr. Francillon had no note of the evidence of either persons who were to be tried for perjury on the hearing of the plaint in question, he would release Mr. Francillon from attending.

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v.  
DUTTON.

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*Evidence—  
Practice—  
Subpoena to  
judge of  
County Court.*



## COURT OF COMMON BENCH.

November 23, 1850.

RE JOHN O'NEILL.

*County Court—Order of commitment—9 & 10 Vict. c. 95, ss. 94  
Habeas corpus.*

*It is not necessary that the warrant for commitment of a defendant in default of payment of a debt recovered in the County Court, be issued immediately after the date of the judge's order for imprisonment. Where the order of commitment in default of payment was made on the 15th of April, but the warrant for arrest and imprisonment was not issued till the 9th of October following:*

*Held, that in the absence of any rule of practice, limiting the time within which a warrant must issue, such lapse of time was not a sufficient ground for the discharge of a defaulting defendant who had been arrested and imprisoned.*

THIS was a motion to discharge a prisoner, who was brought up by *habeas corpus* from the custody of the governor of the House of Correction for the county of Middlesex. The return to the writ set out a warrant dated the 9th of October, 1850, under the seal of the Shoreditch County Court of Middlesex, stating that a judgment had been recovered against the prisoner by the Shoreditch County Court, for the payment of a sum of money by certain instalments; that having made default in payment, he was summoned to appear on the 15th of April, 1850, before the court, under the 9 & 10 Vict. c. 95, s. 98; that he did not appear, or allege any reason for non-attendance, and that therefore the judge on that day made an order that the prisoner should be committed for fourteen days to the house of correction, to attend according to the summons. The prisoner was brought up on the 14th of November.

Skinner now moved that the prisoner be discharged, on the satisfaction of the debt would not, as the case stands, relieve the prisoner from this punishment. The warrant was issued to the clerk of the court, and the clause authorizing proceedings in such cases is the 1st clause of the 94th section of the Act which enacts that "when an order of commitment is made by the judge, the clerk of the court shall make out a warrant;" and no time is mentioned within which he must do this, it is sufficient that he must do so within "a reasonable time" after the making of the order by the judge. If the clerk omits making out the warrant for a great length of time, as here, the right to issue it is

together. If I were the judge of the County Court making the order, I should assume the warrant was made out directly I had issued the order. It appears most unreasonable that it should be in the power of the clerk, a mere ministerial officer, to delay issuing the warrant during his pleasure. On the ordinary principles of justice, if the punishment is reformatory, the warrant should be issued at once. The 105th section prescribes the cases under which the judge may suspend an order, and those are where it appears to him that the defendant is, from sickness, or some other sufficient cause, unable to pay the debt. Unless it be under such circumstances, the judge himself has no power to suspend an order; it is therefore most improbable that the Legislature intended that the clerk should have a discretionary power in issuing the warrant, when, except in the prescribed cases, the judge himself is allowed no such power in the instance of an order of commitment. It is provided by rule 37 of the rules issued by the judges of the Superior Courts for the practice of the County Courts, that no warrant shall be in force for more than two months: and if in this case the warrant had issued, as it ought to have been issued immediately on the making of the order, it would have been issued before the prisoner was arrested and sent to prison. It never could have been intended that such an order should be pending for an indefinite time over a delinquent defendant. It is therefore submitted the prisoner should be discharged.

BERVIS, C. J.—We wished to have a return in this case, because it was a novel point, and one affecting the liberty of the subject. The warrant complies with the provisions of the statute; it states a judgment recovered, default in payment, a judgment summons, and for non-appearance to that, an order for fourteen days' imprisonment, to run from the day of the prisoner's capture. There is a rule made by the judges for the practice of the Inferior Courts restricting the issue of a warrant within a limited time from the date of the order to prison. Certainly there is a rule, as has been stated, which says that the warrant shall not be good for more than two months; but it is consistent with what appears here that the antecedent writs were issued. It would be improperly interfering with the act of Parliament, if we acceded to this application. The prisoner, therefore, is remanded.

LAULE, J.—It would be well if some rule were made respecting warrants as referred to by Mr. Skinner; at present, there being no such rule, the proceedings must be held sufficient.

WILLIAMS and TALFOURD, JJ., concurred.

RE JOHN  
O'NEILL.

1850.

*Order of  
commitment—  
Time of issuing  
habeas corpus.*

*Prisoner remanded.*

## BAIL COURT.

June 16, 1851.

(Before Mr. JUSTICE WIGHTMAN.)

BANKS AND ANOTHER v. REBBECK AND WIFE.

*County Court—Jurisdiction—Prohibition—Title to land.*

*On a rule for a prohibition to the judge of a County Court, on ground that the title to the premises sought to be recovered came in question, it appeared that the defendants occupied the premises, under a written agreement with the owner, for the purchase of the premises for 150l. The sum of 8s. per week was to be paid until the whole of the purchase-money was paid up, the 8s. weekly to go in liquidation of the purchase-money:*

*Held, that the ordinary relationship of landlord and tenant did not exist, and that the County Court had no jurisdiction.*

IN this case a rule *nisi* had been obtained on the part of the defendant for a prohibition to be directed to the judge of the County Court of Whitechapel, restraining him from further proceeding in this cause, inasmuch as the title to land was in question. This was a plaint under sect. 122 of the 9 & 10 Vict. c. 95, the executors of one Benjamin Rebbeck, the father of the defendant, to recover possession of certain premises; and in support of the application it was alleged that the deceased Benjamin Rebbeck, in August 1846, entered into an agreement to let the premises in question, being No. 3, Rose-terrace, to one Hannah Miranda Service, at 8s. a week; that, subsequently, on the 10th of December, in the same year, a fresh agreement was entered into between them, whereby it was agreed that Benjamin Rebbeck should sell the house to said Hannah M. Service for the sum of 150l., and, until that sum was paid, she should pay the rent of 8s. per week, which was to go in liquidation of the purchase-money, and that he would, upon payment of that sum, make out a good title, and execute all necessary deeds. On the day following, Hannah M. Service married the son of the deceased, he (the son) being the present defendant; that in the present year Benjamin Rebbeck died, leaving the present plaintiff his executors, who gave the defendant notice to quit, and instituted the proceedings in the County Court to recover possession of the premises. On the case coming on, the defendant set up the agreement of the 10th December, 1846, alleging that the full amount of 150l. had been satisfied to Benjamin Rebbeck before his de-

going, therefore, that, as he claimed title to the premises, he had no jurisdiction. Upon this the plaintiffs were asked if limited the agreement, which they declined to do; whereupon the learned judge requested to look at the agreement, when he observed that it gave the defendant only an equitable and not a legal title, and he thought that the relation of landlord and tenant had been put an end to between the parties by the notice, and therefore he granted a warrant of possession, but not executed for a month, to give the defendant an opportunity of coming to this court.

The defendant now showed cause, and contended that the agreement in question gave the defendant no rights, it not being a genuine agreement, and that, in fact, no such agreement was proved at the trial, the defendant not having given it in evidence.

The plaintiffs, in support of the rule, argued that the judge had no objection: 1st, because the tenancy was not such a one as was contemplated by the 122nd section of the 9 & 10 Vict. c. 95 (*v. Owen*, 1 Cox, Mac. & Herts. 176); (2d) and, 2ndly, that as to title came into question, it being immaterial whether the title was well or ill founded, if it were a *bonâ fide* claim; the judge dispensed with their calling evidence to prove the contrary, by deciding that the instrument itself was no answer to the application. He also contended that it is now sufficient to show that title to land is in question.

*Cur. adv. vult.*

**HUTCHMAN, J.**—An application was made to this court for a writ of possession to the judge of the County Court of Whitechapel, on the ground that the case was not within the jurisdiction of the County Court. The plaintiffs sought to recover possession of a house which the defendant occupied, by proceeding in the County Court under the 122nd section of the 9 & 10 Vict. c. 95, by which it is enacted, that when and so soon as the term and interest of the lease of any house, &c., where the value of the premises, or the rent payable in respect of the tenancy did not exceed 50*l.* by the year, and upon which no fine shall have been paid, shall have expired, or shall have been duly determined by a legal notice to quit, and the tenant shall refuse to quit the premises, the landlord may proceed in the County Court to recover possession. The defendant, who was the occupier of the premises, resisted the proceedings on the ground that the title to the house was in question, and that the ordinary relation of landlord and tenant did not exist between the plaintiff and the defendant. It appeared that on the 10th of August, 1846, the father of the defendant married Hannah Miranda Service, at 8*s.* a week, to come on that day, and the first payment to become due on the 10th of August Monday, and a week's notice to quit to be given. It appeared, that on the 11th December the defendant married

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The case decided that the 122nd section of the County Court Act contemplates the relation of landlord and tenant, and not that of mortgagor and mortgagee.

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AND WIFE.  
—  
1851.  
—

*Jurisdiction—*  
*Prohibition—*  
*Title to land.*

Hannah Miranda Service, and it was stated in the affidavit on behalf of the defendant, that on the 10th of December the defendant entered into another agreement with Miranda Service, to sell her the house in question for 150*l.* upon payment of that sum, the defendant further agreed to give a good title and execute the proper deeds, conveying the house to Hannah Miranda Service; but until the 150*l.* was paid, the defendant was to pay the father 8*s.* a week for the house, but the 8*s.* a week was to be in part payment of the 150*l.* This agreement was said to be a substitution for the agreement to let, and it was stated that 150*l.* had been paid by so many weekly payments as amount to 84*l.* It also appeared that the defendant, after the marriage, paid 8*s.* a week to the father down to his death, and the defendant paid 4*s.* a week on account of the rent to the mother. The judge of the County Court was of opinion that the title did not come in question. It appears to me that, under the circumstances of the case, after the making of the second agreement, which was a purchase, the occupation was under that agreement and not under the first, and even though the purchase-money had been paid, it would have given no title, but when it was paid the defendant would be in the occupation not as tenant but as purchaser, and the ordinary relation of landlord and tenant would not subsist between the plaintiff and defendant, and the case in principle falls within that of *Jones v. Owen*, which was cited. In that case my Lord Patteson said, that to bring the case within the jurisdiction of the County Court, the ordinary relation of landlord and tenant must subsist between the parties, and upon that case it appears that he ought not to be turned out; but it seems to me, upon a proper construction of the statute as adopted in the case before me, that, in which I concur, that this case is not within the jurisdiction of the County Court, and the rule must be made absolute.

*Rule absolute.*

## COURT OF EXCHEQUER.

April 16, 1851.

JONES v. HARRISON.

*current jurisdiction is given to Superior Court, court's or judge's may be exercised as to costs—The word "may," in 13 & 14*  
*1, s. 13, permissive only, not imperative.*

*14 Vict. c. 61, s. 13 (County Courts Extension Act), it is that if the plaintiff shall make it appear to the satisfaction of the court in which the action is brought, or to a judge at chambers, upon summons, that the action was brought for a cause in which no jurisdiction is given to the Superior Courts by the provisions of the previous County Courts Act (9 & 10 Vict. c. 95), in which no plaintiff could have been entered in any such County Court, that the said cause was removed from a County Court by order, then and in any of such cases the court in which the said action was brought, or the said judge at chambers, may thereupon, by order, direct that the plaintiff shall receive his costs, and thereupon the plaintiff shall have the same judgment to recover his costs as if that act had not been passed: the word "may," in the above section, is permissive only, and not imperative, and that the court or judge can exercise a discretion as to the case under the circumstances as brought before them.(a)*

As an action brought in this court upon a bill of exchange for a sum under 20*l.* (12*l.* 17*s.*) 12*l.* 11*s.* had been served on the writ, and 6*s.* were subsequently paid into court by the plaintiff lived and carried on business in London, and had not lived at Doncaster,—more, therefore, than twenty miles from each other. An application had been made to Martin, B., for the costs of the action, pursuant to the 13th section of 13 & 14 Vict. c. 61, whereupon he made the following order: "That the Master tax the plaintiff's bill of costs in this action, and the costs of and occasioned by this application, but the taxation herein shall be stayed until Monday, the 14th day of May 1851." This was done for the purpose of giving the plaintiff an opportunity of taking the opinion of the court upon the application of the above section, and a rule *nisi* having been made, the court rescind that order, and also for a stay of proceedings until the case should be disposed of, in the above cause.—The question is whether, under the

the case of *Macdougall v. Paterson*, *post*, where the Court of Common Pleas, on time to consider their judgment, decided that the court or judge has no discretionary power, but is bound to give the plaintiff an order for his costs, and this the statute has since been confirmed by the Court of Queen's Bench, in the case of *Wells* (Hilary Term, 1852), which is not yet reported.

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*Concurrent  
jurisdiction—  
Costs—Power  
of Superior  
Court or judge.*

County Courts Extension Act, 13 & 14 Vict. c. 61, s. 13, cretion is given to the judges, and to be exercised by th allow costs on sums recovered under 20*l.* where the S Courts have concurrent jurisdiction. By sect. 11 of that a provided, that plaintiffs recovering in the Superior Court not exceeding 20*l.* in actions of contract, or 5*l.* in actions over which the County Court has jurisdiction, are to have n Sect. 12, which does not bear upon it, says that the judge trial may certify to entitle the plaintiff to costs. Ther sect. 13, which enacts, that if in any such action, whether t a verdict in such action or not, the plaintiff shall make it ap the satisfaction of the court in which such action was brov to the satisfaction of a judge at chambers, upon summons, t said action was brought for a cause in which concurrent j tion is given to the Superior Courts by the 128th sectio said recited act of the tenth year of Her Majesty, or for w plaint could have been entered in any such County Court, the said cause was removed from a County Court by ca then, and in any of such cases, the court in which the sai is brought, or the said judge at chambers, *may*, theret rule or order, direct that the plaintiff shall recover his co thereupon the plaintiff shall have the same judgment to his costs that he would have had if this act had not beer The 128th section of the 9 & 10 Vict. c. 95, enacts, that al and proceedings which before the passing of this act mig been brought in any of Her Majesty's Superior Courts of where the plaintiff dwells more than twenty miles fi defendant, or where the cause of action did not arise who some material point within the jurisdiction of the cour which the defendant dwells or carries on his business at t of the action brought, or where any officer of the Count shall be a party, except in respect of any claim to any g chattels taken in execution of the process of the court, or ceeds or value thereof, may be brought and determined such Superior Court at the election of the party suing ceeding, as if this act had not been passed. A doubt is said in Mr. Justice Williams's mind on the point whether t "may" is not to be read "must," and is not compulsory, ar judge's discretion is given only by express enactment, a only is he to be satisfied, and to exercise a discretion. By there appears a prohibition clearly expressed against cos if you satisfy a judge in the terms of the 13th section, direct that the plaintiff shall receive his costs; but that rative, and costs must be given. The words, "shall have used in the 14 Car. 2, c. 12, s. 18, were held to be ol (*R. v. Barlow*, 2 Salk. 609); the words there were stron the present to import discretion, and yet they were be obligatory. Again, upon the statute as to the sugge breaches. [PARKE, B.—That has nothing to do with thi it is a fallacy in arguing upon that.] In *Roles v. Roswell*

) the stat. 8 & 9 Will. 3, c. 11, s. 8, which enacts, "that in  
ons on any penal sum for nonperformance of covenants, &c.,  
plaintiff *may* assign as many breaches, &c., and if judgment  
ll be given for the plaintiff on *nihil dicit*, the plaintiff *may*  
ggest on the roll as many breaches, &c., as he shall think fit,  
on which shall issue a writ to the sheriff to summon a jury  
fore the justice of assize, &c., to inquire, &c., and to assess the  
mages," &c., was held to be compulsory on the plaintiff; and  
at he could not enter up judgment for the whole penalty on a  
gment by default as he might have done at common law; see  
o *Hardy v. Bern*, page 636, S.V., where reasons are given for the  
gment come to: (*Crisp v. Bunbury*, 8 Bing. 399, was cited.)  
ARKE, B.—All the cases are collected upon that point in  
o case of *Reg. v. The Tithe Commissioners for England and*  
*Wales* (19 L. J. 181, Q. B.)]

*Watson*, Q. C., contra, in support of the case.—The 13th section  
this act of Parliament is to be construed according to the ordi-  
y meaning of the words expressed in it, and unless the court  
inctly sees that the word *may* is to be read as *must*, and is so  
ended clearly by the act, they will not thus determine. (He was  
n stopped.)

POLLOCK, C. B.—I am of opinion that this rule must be made  
olute; the rule to which the court has been referred as to the  
struction of statutes must be here acted upon. In this case, by  
13th section, it is provided [the learned judge read the section.]  
hat, then, is the meaning of the word "may?" Is the judge to  
tain from exercising any discretion in the matter as to giving  
in the cases within that section? or, is he obliged, is it com-  
lory upon him, to direct the costs without exercising any dis-  
tion or judgment in the matter? I cannot say there is no force  
tever in Mr. Bovill's argument, that the word "may" should  
eive equal force throughout, but I should say certainly the  
rd "may" must here be intended to give a discretion to the  
ge, so that his judgment might be exercised upon it as to  
ether the party should recover costs or not according to the  
umstances of the case as he thinks right.

PARKE, B.—I am of the same opinion as the Lord Chief Baron.  
late years, the court acts according to the rule generally  
pted in the construction of a statute, which is, to adhere to the  
ual and ordinary meaning of the words used, unless that is at  
iance with the intention of the Legislature to be collected from  
b statute itself. The word "may," as used in the 13th section  
the act which has been referred to, is clearly permissive. It is  
be read in its ordinary sense; and that being so, it gives a dis-  
tion to the judge, in my opinion, to be exercised by him as he  
inks right. The ingenious argument of Mr. Bovill only caused  
s to doubt; but I am satisfied it was not well founded.

MARTIN, B.—I am of opinion also that this rule should be made  
olute. The order was made for the purpose of taking the  
ion of the court upon it, the question being an important one.

JONES  
v.  
HARRISON.  
1851.

Concurrent  
jurisdiction—  
Costs—Power  
of Superior  
Court or judge.



JONES  
v.  
HARRISON.  
—  
1851.  
—  
*Concurrent  
jurisdiction—  
Costs—Power  
of Superior  
Court or judge.*

The rule as to the construction of a statute, as laid down by brother Parke in 2 M. & W. 195, is a very useful one, which I entirely concur. It is, to adhere to the ordinary meaning of the words used, and to the grammatical construction, that is at variance with the intention of the Legislature, to be rejected from the statute itself, or leads to any manifest absurdity or repugnance, in which case the language may be varied or modified so as to avoid such inconvenience; but no further. What Mr. Watson has said as to the meaning of the word "discretion" here is correct. It is, in my opinion, clearly permissive. The object of the act to discourage actions in the Superior Court for amounts under 20*l*.; and the 13th section gives a discretion to the judge at chambers, to be exercised by him in reference to the costs of cases within that section. A case must be made to satisfy the judge upon it. There may be a vast variety of cases in which such actions may be brought; and in deference to the opinion of my brother Williams, I made this order, the judgment of the court might be taken upon it. I am satisfied, however, that the order is wrong, and the rule must be rescinded.

*Rule aban-*

## BAIL COURT.

*April 17, 1851.*

(Before Mr. JUSTICE COLERIDGE.)

REG. v. THE JUDGE OF THE COUNTY COURT OF OSWESLEY.

*Ex parte HARPER AND ANOTHER.*

*Interpleader claim—Sufficiency of notice—Mandamus to a judge to hear an application. Where a judge of a County Court refuses to hear an application on the ground of an erroneous supposition that some preliminary requirement has not been complied with, this court will interfere by mandamus to compel him to hear.*

*Judgment having been obtained against a defendant in an action in the County Court, execution issued, and certain property was seized under. A claim was then made by A. and B. that such property were theirs, and the form of their grounds of claim was, "that the said two horses, two collars, and two bridles were assigned to us by indenture, dated the 28th day of May, 1850, and made between (stating the parties.) Upon an objection taken at the trial, the*

statement was not a compliance with Rule 39, the judge held the objection to be good, and refused to hear the claim.

Upon an application to this court for a mandamus to the judge to hear the claim:

It was held, that the statement of the ground of claim was sufficient, and the mandamus was ordered to go.

IN this case a rule nisi had been obtained, calling upon the judge of the County Court of Oswestry, Shropshire, to show cause why a mandamus should not issue commanding him to hear and adjudicate upon a claim to certain goods made by Harper and Jones. It appeared that a plaint had been entered in the County Court in a cause of *Davies v. Holbrook*, wherein Davies obtained judgment, upon which, on the 31st of October, execution issued. Levy was made, and certain goods were seized. On the 6th of November following a claim was made by Harper and Jones to the goods, under a deed of assignment from Holbrook, executed the May preceding. The particulars of the claim were as follows:—

‘To the clerk and high bailiff of the County Court of Shropshire, at Oswestry, and to whom else it may concern.—The particulars of the claim made by us, and mentioned in the interpleader summons issued from the above court in the cause of *Davies v. Holbrook*, dated the 5th day of November, 1850, are as follows:—Two horses, two collars, and two bridles, which were seized in a sale at Bagley, in the parish of Hordley, in the county of Salop, the thirty-first day of October, in the year of our Lord 1850: the ground of our claim to the said two horses, two collars and two bridles, is, that they were assigned to us by an indenture, dated the twenty-eighth day of May, in the year of our Lord 1850, and made between Thomas Holbrook, defendant in the said cause, of the one part, and ourselves of the other part. Dated the 11th day of November, 1850.

“GEO. HARPER.

“R. PARRY JONES.”

At the hearing, it was contended, on the part of the execution creditor, that the notice was insufficient, and did not comply with the 39th Rule, inasmuch as it was not stated what was the consideration for the assignment. The judge, thinking the objection to the claim was well founded, decided upon not hearing the claim.

*Peacock*, Q. C., now appeared for the judge of the County Court, and contended that the judge was right in his decision, inasmuch as the notice was insufficient: (*Ex parte Tanner*, 19 J. 318, Q. B.)

*SOLERIDGE*, J.—There the claim was merely repeated, but here it was said that the claim is founded upon a deed.

*Peacock*.—The statement should have shown that the deed was made for a valuable consideration.

*SOLERIDGE*, J.—*Prima facie* the deed imports consideration.

*Ex parte*  
HARPER  
AND ANOTHER.  
1851.

*Interpleader*  
claim—Notice  
—Mandamus.

*Ex parte*  
HARPER  
AND ANOTHER.

1851.

*Interpleader*  
*claim—Notice*  
*—Mandamus.*

Your contention is that a claimant should set out a good case. In *Ex parte Tanner* the claimant merely said the goods were his property, which was not sufficient.

*Lush*, for the execution creditor, argued, first, that as a competent tribunal had already decided upon the insufficiency of the notice, this court would not interfere; second, that the notice was not sufficient in form for not stating the consideration and purposes of the deed.

*Jones*, for the claimant, submitted that the notice was sufficient and that as the judge had declined to adjudicate upon the claim the *mandamus* ought to go.

COLERIDGE, J.—It is a well-known distinction with reference to inferior courts, that if they abstain from adjudicating upon a question upon any erroneous view of a preliminary point, the court will interfere to compel them to proceed and adjudicate, but that it is otherwise where they enter into the question and decide it, though their decision is unsatisfactory. The question is whether there has been an adjudication upon the merits; whether the court abstained on account of the preliminary point. Now, I must take it that the claimant has been refused a hearing on account of not having given a sufficient notice; but as to that it really seems to me that the notice was quite sufficient. The notice need not set out a good ground of claim; it will still be a good claim if it describes in what way the party claims. The judge will decide upon the validity of the claim when he has heard the case. This is not the case of *Ex parte Tanner*. If the claimants show how they claim. It is said that the claim is not sufficient, as the deed may have been a voluntary one, and void as against creditors. So it may be; still, they say this is their claim, and it is for the judge to adjudicate upon it. The claim must be absolute.

*Rule absolute.*

## COURT OF QUEEN'S BENCH.

May 14, 1851.

## TATSON v. THE AMBERGATE, NOTTINGHAM, &amp;c., RAILWAY COMPANY.

*Appeal—Liability of railway company as carriers—Agent.*

~~an~~ action for not duly delivering goods at C., it appeared that when ~~the~~ goods were received by the office-keeper of the defendants, properly directed for C., the plaintiff wished to pay the carriage for the entire journey; but the office-keeper said that he could not receive the money, ~~as~~ he had no rates of payment for a greater distance than N., where ~~the~~ defendants' line joined another railway, but that the things would ~~be~~ well enough. The goods arrived in the regular course at N., but ~~were~~ afterwards delayed upon their journey between N. and C. ~~It~~, that as the office-keeper, being the agent of the company, had not expressly limited their liability, they were responsible for the proper delivery of the goods at C., confirming *Muschamp v. The Lancaster and Preston Junction Railway Company* (8 M. & W. 421.) (a)

~~THIS~~ was an appeal from the County Court of Lincolnshire, held at Grantham.

The plaint was brought in the County Court to recover damages ~~in~~ the defendants, as common carriers, for not delivering at ~~diff~~ certain plans and models in proper time, so that they were late to compete for a prize of 100 guineas, offered by the ~~amorganshire~~ Canal Company for the best plan and model of a ~~mel~~ or machine to load colliers from coal barges: the ~~untiff~~, therefore, brought his action; damages were laid at ~~it~~. It appeared that the package was delivered to the ~~ice~~-keeper of the defendants, at the Grantham railway ~~ation~~, properly directed for Cardiff; and the plaintiff's servant ~~ho~~ delivered them, wished to pay the carriage for the entire ~~amey~~; but the office-keeper declined to receive the money, ~~he~~ he had no rates of payment for a greater distance than ~~ottingham~~, where the defendants' line of railway joins the

Case.

(a) In that case a parcel was delivered at Lancaster to the Lancaster and Preston Junction Railway Company, directed to a person at a place in Derbyshire. The person who brought it to the station offered to pay the carriage, but the bookkeeper said it had better be paid by the person to whom it was directed, on the receipt of it. The Lancaster and Preston Junction Railway Company were known to be proprietors of the line only as far as Preston, where the line was united with the North Union line, and that afterwards with another, and so on into Derbyshire. The parcel having been lost after it was forwarded from Preston, it was held that the Lancaster and Preston Railway Company were liable for the loss.

WATSON  
v.  
THE  
AMBERGATE,  
NOTTINGHAM,  
& C. RAILWAY  
COMPANY.

1851.

*Appeal—  
Liability of  
railway  
company—  
Agent.*

Midland railway. It was suggested that, perhaps, a messenger should be sent with the goods, to ensure their in time; but the office-keeper said there was no necessity so, the things would go well enough. The carriage, the was paid to Nottingham, but no further; the goods despatched in the usual course, but were delayed at Bristol did not reach Cardiff until the day after the adjudication prize. The goods had since been returned to the plaintiff judge gave judgment for the plaintiff, and assessed the damages at 20*l.*, as being the amount of loss occasioned by the non-delivery of the plan and models in time to compete for the prize. questions were raised by the case; first, whether the defendants were liable at all for the delivery of the goods beyond Nottingham; secondly, whether, if at all, for more than nominal damages.

*S. C. Denison* for the appellants.

*Lush*, contra.—*Muschamp v. Lancaster and Preston* (8 M. & W. 421), and the cases there cited, were referred to.

PATTESON, J.—I have no doubt that the office-keeper was the defendants' agent for this purpose; and, as he received the goods to be conveyed to Cardiff without expressly limiting the liability of the company, the company were responsible for their failure to make a proper delivery there. Then as to the damages. By the delay in delivery in time, the model, which was valuable for a particular purpose, lost its value for that purpose; the learned judge did his best to ascertain the amount of that loss; and I cannot see any reason to be dissatisfied with it.

ERLE, J., concurred.

*Judgment affirmed, with costs.*

(b) This case was drawn by the learned judge of the County Court, and some observations being made by the appellant's counsel upon the mode in which the facts were stated, I observed, that the case ought not to be drawn by the judge unless the parties agree upon a statement of the facts. (See sect. 15 of 13 & 14 Vict. c. 61.)

## COURT OF COMMON BENCH.

May 28, 1851.

WILSON v. FRANKLIN, Executor, &amp;c.

*Excess of jurisdiction—Set-off—Prohibition.*

*the plaintiff's account exceeded the limit of the County Court jurisdiction, and he sought to bring it within, by proving an agreement cross-accounts were to be set off between him and the defendant's testator (the defendant being sued as executor), and the judge of the County Court proceeded on that view of the case, and found for the plaintiff, there was no evidence of any binding agreement to that effect, this Court granted a prohibition to restrain all further proceedings in the County Court.*

AY showed cause against a rule nisi for a prohibition to the judge of the Shropshire County Court, obtained on the ground the sum claimed exceeded the jurisdiction, and that it had been brought within the jurisdiction by a set-off: (*Beswick per, 1 Cox, Macrae & Herts. 243.*) It appeared that the defendant was sued as the executor of George Franklin, and the bills attached to the plaint showed a sum due to the plaintiff of 19s. 6d., and at the foot thereof was written, "1850, Oct. Received by cash, 5l.; ditto by Mr. Franklin's bill, 8s. 6d." There was a further charge of 10l. 10s. for expenses, but that amount was abandoned to bring the case within the jurisdiction. The defendant's affidavit stated that there had been, since the testator's death, nor to the belief of the defendant, during his lifetime, any agreement that the two bills should be set off, nor any balance struck; and that at the trial the defendant admitted that no balance had been ascertained or agreed and proved an existing debt of 102l. 9s. 6d. due to him. It was objected, that the judge of the County Court had no jurisdiction in the case, and that the debt could not be reduced by set-off, beyond his jurisdiction; but the judge overruled the objection, and gave judgment for 40l. 17s. 11d. The plaintiff produced affidavits that there had been a previous agreement between the defendant and the testator to set off their respective accounts against each other, and to show that this question had been discussed with the judge, and that he had determined it in favour of the defendant, and that his adjudication proceeded upon this view of that

reason, in support of the rule.—The argument was mainly directed to the point whether the affidavits on the part of the

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v.  
FRANKLIN.  
—  
1851.  
—

*Excess of  
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Set-off—  
Prohibition.*

plaintiff established the fact of an agreement between the plaintiff and the testator, that their respective claims against each other should be set off. The case of *Thomson v. Ingham* (1 Macrae & Herts. 348) was cited.

JERVIS, C. J.—It is unnecessary to consider what ought to be the rule where the judge of a County Court has determined the fact of the existence of such an agreement on conflicting evidence; for, in this case, there was no conflicting evidence at all. The plaintiff's account exceeded the limit of the jurisdiction of the County Court, and there was no evidence of any binding agreement for a set-off.

*Rule abso*

## COURT OF QUEEN'S BENCH.

*May 12 and 29, 1851.*

(Before Lord CAMPBELL, C. J., PATTESON and WIGHTMAN.)

LATHOM v. SPEDDING.

*Jurisdiction—Trespass—Plea of "Not possessed"—Title—C*  
*The 13 & 14 Vict. c. 61, s. 13, throws the onus upon the plaintiff showing that he could not have sued in a County Court, in order to entitle him to costs, and does not apply to every action of trespass which the defendant has pleaded "Not possessed."*  
*In order to oust the jurisdiction of the County Court, the plaintiff must show that the title to the premises did bona fide in the case of question.*

A RULE had been obtained to rescind an order of Patteson directing that the plaintiff should recover his costs in this action, under sect. 13 of 13 & 14 Vict. c. 61, s. 13. This was an action of trespass for breaking and entering the plaintiff's dwelling-house, to which the defendant had pleaded "Not guilty, by statute and "Not possessed." At the trial before Lord Campbell, at the sittings in Middlesex after Hilary Term, 1851, it appeared that the action was brought for a trespass alleged to have been committed in distraining for rent, on certain premises in the possession of the plaintiff. A replevin had been brought in the County Court, and judgment had been received by the plaintiff. At the trial no question arose as to the title to the premises in question. The plaintiff obtained a verdict, with 40s. damages, and the law

refused to certify for costs, under the County Courts Acts. Subsequently, application was made to Patteson, J., at chambers, on the above section, on the ground that this was a cause for which no plaint could have been entered in any County Court; that learned judge made the order, considering that under the section he had no discretion.

LATHOM  
v.  
SPEDDING.  
—  
1851.  
—  
Jurisdiction—  
Trespass—  
Title—Costs.

May 12, 1851.

*Chambers and Wood* showed cause.—This court will not interfere with the exercise of a discretionary power given to a judge. PATTESON, J.—I cannot say I exercised any discretion in this case, because I thought the statute was imperative in the cases to which it applied. But the Court of Exchequer has since held differently. Yes: in *Jones v. Harrison*; but Martin, B., there said that if it were shown that the action could not be brought in any inferior court, every judge would make an order for the costs. The jurisdiction of the County Court was ousted; the defendant, by pleading *not possessed*, chose to put the title in issue, according to *Jones v. Chapman* (2 Ex. Rep. 803), and he, therefore, cannot complain, if s. 58 of 9 & 10 Vict. c. 95, is held to apply to this case. [LORD CAMPBELL, C. J.—Because title may come in question, does it follow that it must?] In *Timothy v. Farmer* (B. 814), it was expressly held, under the original County Court Act, that where *not possessed* is pleaded to an action of trespass, the jurisdiction of the County Court is ousted.

*Wood*, contra.—The question is, is this a case in which no plaint could have been entered in a County Court, whether, in fact, the question of title came in question? and this cannot be ascertained before the trial. Here upon the trial there was no question of title; and the case was a proper one for the County Court: (*Lilley v. Arvey*, 1 Cox, Macrae & Hertslet, 115.)

The onus now lies on the plaintiff to prove his right to costs, and he must show that the title really did come in question to deprive himself of costs.

*Cur. adv. vult.*

May 29, 1851.

LORD CAMPBELL, C. J., now delivered the judgment of the court.—This was a case respecting the jurisdiction of a County Court upon which arose a question of title to costs where the title is brought in this court. The application is to set aside an order of my brother Patteson, allowing the plaintiff's costs; and I am of opinion that the rule must be made absolute. The learned judge made an order for costs on the plaintiff, considering the statute 13 & 14 Vict. c. 61, s. 13, was imperative on him; so, if the cause was one which could not have been brought in a County Court; and treating the plea of "*not possessed*" as conclusive upon him that the title had come in question, and therefore that the County Court could not have entertained jurisdiction of it. By the decision in the case of *Timothy v. Farmer*, it is that the initiative as to depriving the plaintiff of costs, lies



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v.  
SWEDDING.  
—  
1851.  
—  
Jurisdiction—  
Trespass—  
Title—Costs.

on the defendant, by the 9 & 10 Vict. c. 95, and as title may have been in issue, by pleading "not possessed" he was concluded from asserting that the title did not come in question; but by the last act, the onus as to costs for the plaintiff is thrown upon the plaintiff, and we think it clear that he is bound to show that he could not sue in the County Court, by establishing that the defendant has pleaded so that it possibly might have come in question. The words of the 58th section of the 9 & 10 Vict. c. 95, are "that the court shall not have cognizance of any action in which the title to any corporeal or incorporeal hereditaments, or to toll, fair, market, or franchise, shall be in question." We hold that these words mean shall really *bond fide* be in question. The affidavits in this case clearly show that the title was in question. The plaintiff, therefore, might have sued in the County Court, and the attempt at ousting the jurisdiction of the court on a pretence of this nature must fail. The order, therefore, cannot be supported, and the rule will be absolute.

*Rule absolute.*

## EXCHEQUER CHAMBER.

ERROR FROM THE EXCHEQUER.

June 21, 1851.

(Before PATTESON, MAULE, WIGHTMAN, CRESSWELL, ELLIOTT, and TALFOURD, JJ.)

OWENS v. BREESE.

*Action under 20l.—Writ of trial—3 & 4 Will. 4, c. 42, and 9 & 10 Vict. c. 95. The 3 & 4 Will. 4, c. 42, s. 17, provides that in any action in any of the Superior Courts for a demand under 20l., the court, or a judge, may order that the issue joined be tried before the sheriff of the county where the action is brought, or any judge of any Court of Record, the recovery of debt in such county. The County Courts Act, 1846, enacts that every court holden under that act shall be a Court of Record.*

*Held, that the County Courts established under 9 & 10 Vict. c. 95, are not such courts as are contemplated by the 3 & 4 Will. 4, c. 42, s. 17, that, therefore, a writ of trial under that statute cannot be directed to a judge of a County Court established under 9 & 10 Vict. c. 95.*

THIS was a writ of error to the judgment of the Court of Exchequer. It appeared that the action was brought for the sum of 3l. 1s., and that an order had been made for a writ

under 3 & 4 Will. 4, c. 42, s. 17. The order was in the following form:—

*Creese* } Upon hearing the attorneys or agents on both sides, I  
v. } do order that a writ issue out of Her Majesty's Court  
*Pen.* } of Exchequer of Pleas at Westminster, directed to the  
re of the County Court of New Town, Montgomeryshire,  
commanding him to summon a jury to try the issue joined herein,  
that the said *sheriff* return such writ, with the finding of the  
indorsed thereon, to the said court, on a day certain to be  
ed on such writ, pursuant to the statute. Dated the 13th  
of March, 1851.

OWEN  
v.  
BREKESE.  
—  
1851.

Error—Writ  
of trial—3 & 4  
Will. 4, c. 42,  
s. 17, and 9 & 10  
Vict. c. 95.

“WM. WIGHTMAN.”

he writ was afterwards issued directed to the judge of the  
nty Court, and the cause was tried by him and a jury of  
e. The defendant appeared at the trial by his attorney, and  
rdict was returned for the plaintiff. Subsequently (May 9)  
le was obtained, calling on the plaintiff to show cause why  
rder of Mr. Justice Wightman, and all subsequent proceedings,  
ld not be rescinded or set aside, or why the verdict  
d for the plaintiffs, and all subsequent proceedings thereon,  
ld not be set aside with costs, and all proceedings stayed in  
neantime, on the ground that the judge had no power under  
& 4 Will. 4, c. 42, s. 17, to direct a writ of trial to a judge  
County Court, and also that the writ itself was bad in  
ting the sheriff to return it. That rule, on its coming on to  
rgued, was discharged, and the defendant now brought his  
of error against that decision of the court below.

*ush*, for the plaintiff in error, having stated the facts of the  
, was stopped by the court, and

*ramwell*, for the defendant in error, was called upon.—The  
tion is not as to the constitution of the court, but whether  
judge is a judge of a Court of Record, trying cases not  
eding 20l. The jurisdiction is given to the person, not to the  
t. If the act is read as merely designating the person by  
rence to his office, all difficulty is at an end. The writ is  
o to the judge, and to command him to summon a jury, and  
judge is try in the same manner the sheriff would try.  
TTESON, J.—The 72nd section of the 9 & 10 Vict. c. 95,  
ides that the sheriff shall furnish to the clerk of the County  
rt a list of persons qualified and liable to serve as jurors within  
jurisdiction of the court; and when the cause is to be tried  
jury, the clerk is to summon them; so that the judge has  
erials for trying by a jury, but then, the act says he shall try  
lve jurymen.] The judge of the County Court is appointed  
er the 9 & 10 Vict., and is required to act in precisely the  
e manner as the judge of any other Court of Record would do  
writ of trial were sent to him; it then becomes his duty to  
mon a jury, and to proceed to try the cause. The 17th  
on of the 3 & 4 Will. 4, c. 42, enacts, that in any action

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Vict. c. 95.

depending in any of the Superior Courts for any debt or demand in which the sum sought to be recovered, and indorsed on the writ of summons, shall not exceed 20*l*., it shall be lawful for the court in which such suit shall be depending, or any judge of any of the said courts (if such court or judge shall be satisfied that the trial will not involve any difficult question of fact or law, and such court or judge shall think fit so to do), to order or direct that the issue or issues joined shall be tried before the sheriff of the county where the action is brought, or any judge of any Court of Record for the recovery of debt in such county, and for that purpose a writ shall issue directed to such sheriff commanding him to try such issue or issues by a jury to be summoned by him, and to return such writ with the finding of the jury thereon, indorsed, at a day certain in term or vacation to be named in such writ; and thereupon such sheriff or judge shall summon a jury, and shall proceed to try such issue or issues. The judge of a County Court has power to try cases therefore, under that section, he being a judge of a Court of Record. And the 18th section of the above act gives the judge to whom the writ of trial is directed, all the powers of a judge Nisi Prius. The County Courts are expressly made Courts of Record by the 3rd section of the 9 & 10 Vict. c. 95, which, in defining the jurisdiction of the Courts, &c., expressly enacts that every court holden under that act shall be a Court of Record. This action was for the recovery of a debt under 20*l*., and was within the county, consequently it is within the statute, and the order is valid. The practice is now to direct writs of trial in such circumstances to judges of the County Courts instead of the sheriff as heretofore. Such orders are frequently made; and judges of these courts are better qualified to try a case than the sheriff or undersheriff, and there is no reason why the practice should not continue. *Farmer v. Mountford* (8 M. & W. 266) was cited by the other side, to show that a writ of trial directed to the recorder of a borough commanding him to summon a jury of his county was irregular; and in the same case (9 M. & W. 100), where a writ of trial was directed to the recorder of a borough, directing him to summon a jury of the borough duly qualified according to law, it was held regular, and that it was not necessary under the 3 & 4 Will. 4, c. 42, s. 17, that the jury should be taken from the county. That case merely decided that the recorder must summon a jury from his own jurisdiction, not that he had no authority to try the case. Lord Abinger there said, "It appears to me that the right construction of the statute is, that the inferior judge to whom a writ of trial is directed shall summon for the trial such a jury by law and usage he is entitled to summon."

*Lush*, for the plaintiff in error.—In the first place it becomes necessary to see what courts were in existence at the time the 9 & 10 Vict. c. 95 was passed, in order to ascertain whether it was the intention of the Legislature that these County Courts should

passed, all the then existing Courts of Record proceeded to common law, and tried causes by a jury of not less than twelve in number. The object of the statute of Will. 4 was to give assistance to the judges of the Superior Courts, by enabling the inferior Courts of Record to try certain actions. The 16th and 17th sections of that act assume that the judge is empowered to summon a jury, which is not the case with the inferior Courts. If it were intended to confer new powers, there would have been framed special provisions for carrying out the intention. The 23rd section of that statute allows amendment to be made in the record in certain cases; but how can it apply to the County Court, where, in fact, there is no record?

The section of the County Court Act which has been referred to as making those courts Courts of Record, certainly uses general words, but it was only intended that they should be Courts of Record for certain purposes. Those courts, if instituted, cannot carry out the directions of the writ. The writ is to come from the county where the action is brought. The 1st section of the County Courts Act only authorizes the summoning of a jury from the district. What jury is the County Court judge empowered to summon under this writ? What number—five or twelve? From whom—from the county or only from the district; and what is to be the qualification? The qualifications of jurors are prescribed in the 42nd section. Again, under 3 & 4 Will. 4, c. 42, the judges could not remove the parties, yet the County Court judge can.

MR. JUSTICE BURNES, J.—The reading of these acts together causes some difficulty. I am inclined to think that the 3 & 4 Will. 4, is not applicable to Courts of Record whose proceedings are regulated according to the common law. Then, are these new Courts such Courts of Record? If they are, and a writ can be sent to them under this statute, the proceedings

## EXCHEQUER CHAMBER.

February 4, May 15, and June 3.

(Before PARKE, B., ALDERSON, B., PATTESON, J., COLERIDGE, J., WIGHTMAN, J., ERLE, J., and PLATT, B.)

BUCHANAN, plaintiff in error, v. KINNING, defendant in error.

*Small Debts Act, 8 & 9 Vict. c. 127—Commitment of judgment for nonpayment—Liability of attorney—Pleading—What in issue.*

*Under 8 & 9 Vict. c. 127, s. 1, which provides that a debtor against whom a judgment has been obtained may be summoned before any certain inferior courts, and that if he appears to have the means of paying by instalments, and shall not pay at such times as the court order, the judge may commit him for any time not exceeding forty days. Held, affirming the decision of the Court of Common Pleas, in the judgments of Patteson and Coleridge, JJ., that a summons is necessary to show cause why the debtor should not be committed is necessary prior to the committal. Erle, J., and Martin, B., dissentientibus.*

*In trespass for false imprisonment, the defendant pleaded that he recovered a judgment against plaintiff; that the plaintiff was summoned before an inferior court under 8 & 9 Vict. c. 127, s. 1, and an order was made for payment by instalments: that plaintiff defaulted, which, being proved before the said court, the judge directed according to the form of the statute, and at the request of the defendant, the attorney of W. T. acting upon his retainer, ordered plaintiff to be committed to prison for forty days; that the defendant, as such attorney, delivered the warrant to an officer to be executed, who arrested the plaintiff and detained him in prison.*

*Replication, that the said judge did not order that the plaintiff should be committed modo et formâ.*

*Held, reversing the decision of the Court of Common Pleas, that the defendant traverse in the replication put in issue the fact of the making of the order of committal only, and not its validity.*

*Quære—Whether, although the plaintiff below was entitled to a writ of habeas corpus, he can sue under the circumstances in question for an erroneous order of the judge.*

*But if he can, the attorney of the party is liable for ordering the writ of the judge to be put in execution.*

**TRESPASS**, by Thomas Kinning (the plaintiff below) against assault and imprisonment.

The defendant (below), the now plaintiff, pleaded, first, not guilty. Issue thereon.

Secondly, that before the said time when, &c. to wit, on the 1st day of October, in the year of our Lord, 1846, William T. levied his certain plaint against the plaintiff (i. e. the plaintiff below) in the court of our Lady the Queen, before Thomas Ch.

at the Guildhall of the said city of London, and within the said city, and within the jurisdiction of the said court, the said William Townley, by the consideration and judgment of the said court, recovered against the now plaintiff, as well a certain debt of £37. 12s. 6d. for his costs of suit, as by the record and proceedings thereof still remaining in the said court appears, and the passing of an act of Parliament, passed in the 9th year of the reign of our Lady the now Queen, entitled *An Act for securing the payment of Small Debts*, and before the said plaintiff, &c. to wit, on the 5th of December, in the year last past, the plaintiff then being indebted to the said William Townley in a sum not exceeding 20*l.* besides costs of suit by force of the said judgment, to wit, the sum of 19*l.* 19*s.*, the said William Townley made application by petition and note in writing, according to the form in schedule (B.) to the said act of Parliament, to the said court, the same being an inferior Court of record for the recovery of debts in and for the city of London, and being held at the Guildhall aforesaid, in the said city, and within the jurisdiction of the said court, and the plaintiff then being within the jurisdiction of the said court, to wit, within the said city of London, and the said court then having a judge, who was a barrister-at-law (that is to say), Edward Bullock, Esq., barrister-at-law, then being the judge of the said court, by which said plaintiff and note in writing the said William Townley requested the said court to summon the plaintiff to answer touching the debt due to the said William Townley by the judgment of the said court in his, the said William Townley's behalf; and thereupon the said court afterwards, to wit, on the 7th December, 1846, upon application of the said William Townley, granted to the said William Townley a summons according to the form in schedule (A.) unto the said act of Parliament annexed, by which the said plaintiff was required to appear at the Sheriff's

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order notice was given to the plaintiff, who was also duly with a copy thereof, and the original order was at the time shown to him. That the plaintiff did not pay the said ments, but made default in the payment thereof, and there being duly made to appear, and it being proved to the court that the plaintiff had had notice of the order and been served a copy, and shown the original, and had not paid the said ments, the said court, so holden as aforesaid, before the said *Edward Bullock*, so being such judge of the said court and such barrister-at-law as aforesaid, before the said time when, &c., to wit day and year last aforesaid, at London aforesaid, and within the jurisdiction of the said court, *duly and according to the form of the said statute, ordered that the plaintiff should be committed for 14 days* to Her Majesty's debtors' prison for London and Middlesex in the city of London, being the common gaol wherein under judgment, and in execution of the Superior Court of Justice, might be and were usually confined within the said London, being the city in which the plaintiff was then and thereupon the said *Edward Bullock*, so being, and judge of the said court, and barrister-at-law, at the request of the defendant, then being the attorney of and for the said *William Townley*, and as such attorney, and acting upon the return at the request of the said *William Townley*, duly and according to the form of the statute in such case made and provided, and there made his warrant in writing, under his hand and seal directed, &c. The plea then set out the warrant, and averred that it had been delivered by the defendant, as such attorney, to the serjeant-at-mace to be executed in virtue of which warrant, and at the said request of the defendant as such attorney, the plaintiff was taken and arrested, and committed to the debtors' prison, and detained therein for thirty-nine days, and the said instalments remaining unpaid.

*Replication to the second plea.*—"That the said *Edward Bullock* did not order that the plaintiff should be committed for forty days to Her Majesty's debtors' prison for London and Middlesex, in the city of London, in manner and form as in the second plea alleged thereon.

The issue was tried before *Wilde, C. J.*, and the defendant's counsel tendered a bill of exceptions to the ruling of the judge, and a writ of error was thereupon brought, and it was set out upon the record in error. In the first instance it appeared that *Lloyd Simpson* was called as a witness, and proved that he was serjeant-at-mace at the Sheriff's Court, and that the warrant of commitment against *Kinning* was delivered to him; and then it was also proved that the order was made to pay; "that the said *Thomas Kinning* should pay the said ments and costs aforesaid to the said *William Townley*, in manner and form as in the said plea alleged, that is to say, the sum of 2*l.* thereof on the 12th day of the month then next," and the rest by instalments: "that he, the plaintiff, did not know from whom he received the warrant: that he

and the said Thomas Kinning, and could not, that the witness knew a person named Beard, a clerk of the defendant (Buchanan), who attended to the defendant's business in court, and had done so for years: that the said Beard likewise attended to the department of business concerning warrants in the defendant's office; that when the witness applied at the defendant's office about such things, the witness, was referred to Beard upon them generally; that Beard attended to the business of the defendant relative to the Small Debts Act; that after he, the witness, had searched for the plaintiff two or three days, he, the witness, saw Beard, who desired him not to execute the warrant: that he, the witness, had acted under Beard's directions on a former occasion: that afterwards, on the 24th of April, he saw Beard at the defendant's office, and that Beard then and there told the witness to execute a warrant against the plaintiff as soon as he, the witness, could; in consequence of which the witness went to seek the said Thomas Kinning; that he found the said Thomas Kinning, who asked him to let him the said Thomas Kinning go to the defendant, and the witness thereupon took him to the defendant's office, where the defendant then was; that they, the plaintiff and the witness, saw the defendant there; that the witness then said to the defendant, 'I have allowed Kinning (meaning the plaintiff) to come here to see if he can make an arrangement;' that the said Thomas Kinning then said to the said defendant, 'I did not think you would have served me so;' that the defendant said, 'I could not help it; it was no fault of mine:' they then spoke together. At the witness, after waiting five or six minutes, said, 'Are you ready to come to any arrangement?' the defendant said 'No:' that the witness then said, 'Mr. Kinning, you must accompany me that the plaintiff accompanied the witness to Whitecross Prison, where the witness left him. On cross-examination the witness said, he believed he received the said warrant from one Hudson, an officer of the said court. The counsel for the plaintiff also called one William White, who, being sworn, deposed that he saw the said Thomas Kinning in prison, when he was there under the said warrant; that in consequence of what he told the witness, he, the witness, went to the defendant at his office, and that the defendant that he, the witness, had come at the request of the Kinning, to make some arrangement to release him from prison; that the defendant and the witness arranged that, on payment of 2*l.* 10*s.* or 3*l.* and giving security for the rest, Mr. Kinning should be discharged from prison; that the defendant said he would discharge the plaintiff on payment of 2*l.* 10*s.* or 3*l.* and security for costs: that he, the witness, told the defendant he was surprised, because the plaintiff (Townley) in the action against the said Thomas Kinning, had become a bankrupt, and the creditors had no desire to keep the said Thomas Kinning in custody; that the defendant then said to the said witness, 'but you know I must have my costs; they must be made secure;' that he, the witness, saw the defendant five or six times, while the plaintiff

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remained in custody, upon the subject of the plaintiff's discharge and offered, upon one occasion, to pay two pounds ten shillings and three pence, provided defendant would give plaintiff his discharge; that defendant said he must have security for the balance; that plaintiff told defendant that it was utterly impossible, from the situation in which plaintiff was in, for him to give security, and witness thought it a very hard thing for Kinning, the plaintiff, to remain in prison. The then plaintiff in the suit in the said Sheriff's Court, the official assignee and the trade assignees of such then plaintiff, were willing that Kinning should be discharged; and that witness applied to them; that upon one of the interviews between plaintiff and defendant, a person named Austin, the solicitor for the trade assignees, and agent for the assignees under the said bankruptcy, was present, and that Austin then said his clients (namely the said assignees) were willing to discharge Kinning, but would not be responsible for costs; the defendant persisted in having security for his costs; that he, the witness, then said to defendant, 'It appears to me (meaning himself the witness) that there is some feeling at the bottom of all this, and that I should never get his discharge till he paid the whole;' that witness, had the money (2*l.* 10*s.* or 3*l.*) wherewith to pay; and offered it to the defendant on every occasion but the first; that the defendant said he had no objection to the plaintiff being discharged, provided he, the defendant, was paid his, the defendant's costs." And the said counsel then further proved that Thomas Kinning was imprisoned and in prison thirty-eight days under the said warrant. The counsel for the defendant called the witnesses, who were duly sworn, and who gave evidence in support of each of the said issues, and in order to maintain the second issue produced and gave in evidence the record of the proceedings in the Sheriff's Court. The counsel for the defendant then contended that there was no evidence in support of the first issue, and the counsel for the plaintiff contended that there was evidence to support the second issue. The Lord Chief Justice found that there was evidence in support of the first issue, and that there was no evidence to support the second issue, and directed the jury to find the said second issue in favour of the plaintiff, and whether the defendant was guilty of the trespasses in the narration mentioned, and what the damages were. To that effect was a bill of exceptions. The jury found both issues in favour of the plaintiff, with 20*l.* damages, whereupon a writ of error was brought.

The writ of error was argued in the first instance (February 1851) before Patteson, Coleridge, Wightman, Erle, JJ., and Alderson, and Platt, BB.

*Bramwell* for the plaintiff in error.—First: the order of commitment was valid. It is submitted that the decision of the Court of Common Pleas in *Kinning's case* (1 Cox, Macrae & Halliday) and the judgments of Patteson and Coleridge, JJ., in the said case, reported in the same volume, pp. 7 and 9, cannot be maintained. *Abley v. Dale* (reported as *Abdey v. Dale*, 1 Cox,

. 416; 20 L. J. 33, C. P.), proceeded upon the authority of *King's case*. The general rule, it is true, is, that where an parliament imposes a penalty, the party liable shall not be liable without an opportunity of being heard. But that rule is to be construed to be deduced from the language of each particular statute, and is not an abstract proposition of law; and a minute consideration of the 9 & 10 Vict. c. 95, ss. 98, 99, will be found that in a case like the present the judge of the County Court may commit a defaulting judgment-debtor by summons to show cause. The statutes 8 & 9 Vict. c. 127, 8 Vict. c. 96, were referred to as analogous, and as showing a party might be committed to prison upon an *ex parte* order. The case of *Re Hammersmith Rent Charge* (19 L. J. 416) was also cited. (This court intimated that the majority of the judges were not likely to overrule the decisions cited, and that the present impression was that the decision of the Court of Common Pleas was correct, and Erle, J. was the only judge who dissented from that view.) Secondly. The ruling of the learned judge that there was no evidence in support of the plea was wrong. The only fact in issue on the replication and second plea was the making of the order, and not the validity of its validity. The case of *Dresser v. Stansfield* (14 L. J. 822), which will be relied on by the other side, has no bearing upon this point. There a special plea showing grounds upon which it was intended to raise the question of validity of an award, was specially demurred to as an evasive plea of *nul award*, and the court held that it was so, and the plea of no award meant no valid award; but here the terms of the traverse limit the issue to the fact of the making of the order, and do not raise the question of its validity. See *s. v. Germaine*, 7 B. & C. 468; *Everard v. Paterson*, 645; *Cooke v. Blake*, 17 L. J. 370, Ex.; *Adcock v. Wood*, 552; and *Kinning v. Buchanan*, 1 Cox, Macrae & Herts. 552. (The case cited upon this point.) Thirdly. The defendant is not liable for what he did, and is entitled to have the verdict entered upon the general issue. If this commitment was a proceeding, what has the defendant, the attorney of the plaintiff, done to make him liable in this action? As the defendant does not profess to act on his own behalf, no ratification of the proceeding will make him liable: (*Wilson v. Tummon*, 6 Sc. N. C. 6 M. & G. 236.) Process of contempt differs from a writ, and an attorney is not liable, if he takes no steps in the execution of the warrant: (*Cooper v. Harding* 7 Q. B. 928; *St. Quintin*, 12 M. & W. 441, is not in point; *Sedley v. Sedley*, 3 Esp. 202; *Carratt v. Morley*, 1 Q. B. 18.) The plaintiff issues the warrant, and not the attorney, and the clerk of the court hands it to the serjeant-at-mace; the defendant, therefore, is not liable for the issuing of this invalid warrant: (*s. v. Rosher*, 18 L. J. 340, Q. B.) Lastly, this was a case in which the County Court had jurisdiction over the subject of

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Argument resumed before Parke, B., Patteson, J., Wightman, J., Platt, B., Erle, J., and Martin, B.

*Pashley* (*Henniker* with him), for the defendant in error.—As the first point, the decisions in the Court of Common Pleas relied upon, and also the intimation of opinion of the majority of the judges of this court already given. Secondly, as to what was in issue by the traverse in the replication. The plea alleges that the said Edward Bullock, &c., duly and according to the form of the said statute, ordered that the plaintiff should be committed for forty days, and the replication traverses that allegation in the terms:—"That the said Edward Bullock did not order that the plaintiff should be committed for forty days, &c., in manner or form as in the said plea alleged." That traverse involves the making of the order, and its validity, therefore, as well as the fact of its being made, was in question, and the direction of the learned judge was right: (*Dawes v. Papworth*, Willes, 408; *Lewis v. Parkes*, 3 M. & W. 133; *Dudlow v. Watchorn*, 15 East, 2; *Nightingale v. Wilcoxon*, 10 B. & C. 202; *Reg. v. The Justices of Cornwall*, 2 D. & L. 775; 1 Wms. Saun. 376; *Cooke v. Bell*, 17 L. J. 370, Ex.) As to the third point, the following authorities were referred to: *Calder v. Halket*, 3 Moore's P. C. 7; *Smith v. Boucher*, Stra. 993; S. C., Cunningham, 89, 127; *Gardner v. Howard*, 10 Q. B. 411; *Watson v. Bodell*, 14 M. & W. 57; *Wright v. Hampshire*, 9 Dowl. 171; *Andrews v. Marris*, 1 Q. B. 1; *Cripps v. Durden*, Cowp. 640. Cur. adv. vult.

JUDGMENT.—June 3.

PARKE, B., delivered the judgment of the court, and, after stating the pleadings and facts as above, proceeded:—This case was argued before my brothers Patteson, Wightman, Erle, Platt, Martin, and myself. On the argument of this writ of error before us, three exceptions were taken to the direction of the Lord Chief Justice Wilde on the trial: first, that the order of commitment was valid; secondly, that the only question in issue on the replication to the plea was the fact of the order having been made to the effect stated in the plea, and not the validity of that order; thirdly, that there was no evidence to make the defendant responsible for putting the warrant in force; and fourthly, that the order being made by the judge of a Court of Record, although invalid, was nevertheless a protection to the officer acting under it, and the attorney in the cause. On the first question, the court intimated an opinion (except my brother Erle and Martin, the former of whom has given his reasons already expressed (See 1 Cox, Macrae & Herts. 12), and the latter concurs in them), that they consider the question as to the plaintiff's

entitled to his discharge on the *habeas corpus* to be that to make the order of commitment valid, a premons was necessary. On the third question also, this stated that they thought there was evidence for the jury warrant was originally ordered to be executed so as to defendant, as the order of his clerk to execute it was ratified by him. On the second and fourth questions took time to consider. On the second, we are all satisfied the matter in question in issue on the second plea was the order having been made as alleged, and not the other; and, consequently, that the Lord Chief Justice have directed the jury to find a verdict on that issue for the defendant. The plea states a great number of facts necessary to Bullock jurisdiction over the cause, and to make the recovery of the debt by Townley, that the inferior Court of Record, that there was a petition; a summons; service of summons, appearance; examination, order to pay by instalments; notice thereof, non-compliance with the order; and that it was duly made and adjudicated that it did appear, that he had notice of that it was served upon him, demand made, and that they were in arrear; whereupon the court duly, and according to the form of the statute, made the order of commitment. The traverse in the replication is that the order was not made in the manner and form in which it was made, not that it was not made duly and according to the form of the statute, that it was not made in the terms of the issue. If it was the intention of the plaintiff to include only the fact of the order being made, more apt words could not have been used; but, supposing the traverse was in the formal terms that the order was not made duly according to the form of the statute, we do not think the replication it would be considered as including the fact that the plaintiff was duly summoned, and neglected to answer the charge of not paying the instalments. It is said that this traverse would not put in issue any one material and special allegations; for admitting, *arguendo*, that there was an allegation, simply, that the order was not made duly and according to the statute, and that the traverse in the replication was not made duly and according to the statute, the validity of the order would be involved in the question on such an issue as this, where divers facts essential to the validity of the order are stated, and an opportunity to the defendant is afforded, the denial of the making of the order would involve the denial of any one of those facts, as where it is said that one was seised in fee and demised, the plea of *non est* would not involve the question of seising in fee, as was fully decided in the case of *Cooke v. Blake* (17 L. J. 370, Ex.; S. C.).

All these facts being admitted, and the order alleged to have been made thereupon, that is, on the happening of those

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circumstances, duly and according to the form of the statute cannot possibly believe that this was meant to be a traverse implication, that the additional facts existed which are now to be necessary; that is, that the debtor was summoned to court, and neglected to appear, or appeared and made no defence, and that thereupon the order was made. The averment of facts, and that the order was made on a certain adjudication of facts by the court, seems to us inferentially to state that these were all the facts on which the order was made, and the averment that it was duly made means, in this plea, that it was made because the premises warranted it, not that the other circumstances existed. We are, therefore, of opinion, that the Lord Chief Justice's direction was wrong upon this point, and we are not now called on to decide whether, under the present plea or not as containing an averment that there was a summons and non-attendance, or attendance and no excuse, the plea is bad or not; that will be open hereafter, when the case is found for the defendant upon this plea. If the plaintiff is entitled to his discharge on the *habeas corpus*, as follows from what we have said, it does not, therefore, follow that a person so discharged can bring an action of trespass. The case of *Hammond v. The People* (1 Mod. 184), shows that when this record comes before us at that point will be discussed. We need not at present give our opinion upon it. Therefore, the judgment will be reversed, and a venire de novo awarded. *Venire de*

## JUDGES' CHAMBERS.

July 16, 1851.

(Before PARKE, B.)

SHARP v. EVERLEIGH.

### Costs.

*A judge at chambers has jurisdiction under the 13th section of Vict. c. 61, to order costs, notwithstanding an order of reference whereby the arbitrators had the same powers to certify as a judge.*

THIS was an action of covenant, which came on for trial at the last Spring Assizes for Sussex, at Lewes, when the case was referred under the usual order. There were two issues raised, one of which the defendant had paid 20*l.* into court, and on the other issue had a verdict. The plaintiff had a verdict on the

t for less than 20*l*. The plaintiff having obtained an order for his costs, under the 13th section of 13 & 14 Vict. c. 61, the defendant now applied to set that order aside, on the ground that the same was made without jurisdiction, the arbitrator having acted without the power to certify; and he not having certified, the judge had no power to make an order for costs.

The defendant, B., said he considered the plaintiff entitled to the costs, as he had clearly jurisdiction to make the order. Therefore, the order for costs must be dismissed with costs.

The defendant's counsel for the plaintiff.  
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*Summons dismissed with costs.*

## COURT OF EXCHEQUER.

June 16, 1851.

HEWITT v. PATERSON.

*Suggestion—London Small Debts Act.*

Whether the London Small Debts Act is so affected by the Courts Extension Act as to render it unnecessary to enter a suggestion on the roll to deprive a plaintiff of costs where the sum recovered, in an action on contract, is less than 20*l*.

In this case a rule had been obtained calling upon the plaintiff to show cause why a suggestion should not be entered upon the roll to deprive him of costs, under the City of London Small Debts Act (10 & 11 Vict. c. lxxi.), a verdict having been returned, in an action on contract, for less than 20*l*.

The defendant now showed cause, and contended that the general Courts Extension Act (13 & 14 Vict. c. 61) had done away with the necessity of entering a suggestion, as well under the City of London as under the General County Court Act (9 & 10 Vict. c. 11). Sect. 11 of the Extension Act is a general enactment that in all actions in the Superior Courts where less than 20*l*. is recovered, the plaintiff shall have judgment for the sum recovered with no costs. Thus a suggestion becomes unnecessary.

The plaintiff, in support of the rule.—The whole of the County Courts Extension Act throughout contemplates County Courts only, and not the City of London. Sects. 1, 2, 13. The defendant comes here for a suggestion as a matter of right under the London Act. The object of the other Act is to assist this application is to go before a judge under the

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13th section of the Extension Act to get costs under the discretionary power given by that section.

By the COURT.—You may make your rule absolute, and let the other side, if they think fit, demur; *valeat quantum*.

*Rule absolute to enter suggestion. (a)*

### COURT OF COMMON BENCH.

June 16, 1851.

CAWLEY and ANOTHER, Apprs., FURNELL and ANOTHER,  
Resps.

*Appeal—Jurisdiction where judge tries question of law and fact—Statute of Limitations, 9 Geo. 4, c. 14, s. 1—Offer to pay in goods, but not in money—Costs of appeal.*

*F. brought his plaint in the County Court to recover from C. the sum of 34l. 12s. 1d., balance due for goods sold and delivered. C. relied on the Statute of Limitations to defeat the claim. The goods were sold in 1842; and, in order to take the case out of the Statute of Limitations, F. relied mainly on a letter from C. dated April 25, 1845, the material parts of which were as follow:—"I must candidly tell you that for all, I never shall be able to pay you in cash, but you may have any of the goods we have at the Pantechmicon, by paying the expense incurred thereon, without which they cannot be taken out." A witness was also called by F., who proved that in 1844 he had an interview with C. respecting the debt, when accounts were stated, and the balance now sued for was admitted to be due; and that in March, 1845, it was agreed that F. should take goods belonging to C. from the Pantechmicon; that goods were selected for that purpose, but C. failed to forward them.*

*The plaint was tried without a jury; and the judge, considering the letter and the above evidence sufficient to bar the Statute of Limitations, gave judgment for F. (the plaintiff below.)*

*On appeal, the court reversed the decision, and gave judgment for C. (the defendant below), with costs of the appeal.*

*An appeal will lie from the County Court in cases where neither party calls for a jury, and the judge is left to decide on both law and fact. In appeal cases from the County Court (the Chief Justice being excluded by the statute from the hearing of them) the court will simply give judgment, without stating reasons for the conclusion it has arrived at, in like manner as in cases where it is called upon to review the decisions of commissioners of taxes.*

(a) It was ultimately settled on the payment of 5l. costs.

as an appeal from the decision of the judge of the County Court of Dorsetshire, held at Poole. The special verdict by the judge for the opinion of this court showed that the balance due for goods sold and delivered by the plaintiffs below to the defendants below, in the year 1842, to the amount of £100, which, after giving credit to the defendants for goods sold to the plaintiffs, to the amount of 19*l.* 4*s.* 4*d.* left the plaintiffs the sum of 34*l.* 12*s.* 1*d.* The defendant, Joseph Cawley, not being duly served with the summons to action proceeded under the 68th section of the County Court Act (which provides that one of several persons liable may sue against Joseph Cawley alone. The defendants admitted that the balance of 34*l.* 12*s.* 1*d.* was owing from them to the plaintiffs, but relied on the Statute of Limitations to defeat the claim.

To take the case out of the statute, a witness was called, who proved that as the agent of the plaintiffs he had an interview with the defendants in the year 1842, and accounts were stated between the parties, and the balance admitted to be due to the plaintiffs; that in March, 1843, at another interview with the defendants, when one of the plaintiffs (Joseph Cawley) stated that it would be more convenient to have the goods than in money, and he proposed that the plaintiffs should take the goods of the defendants out of the Pantechmicon. At Joseph Cawley by appointment at the Pantechmicon on the following day, when the goods belonging to the defendants were taken in the witness, and a list of them, with the prices, was made out by Joseph Cawley; and it was stated that the plaintiffs might be had in liquidation of the balance due to the plaintiffs. That he (the witness) then agreed to take two beds for 20*l.*, and the other for 15*l.* 10*s.*, subject to the plaintiffs' approval, and to be forwarded. The defendants failed to do so, upon which the plaintiffs wrote the following

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“ Poole, 1st April, 1845.

Edward Cawley,

Dear Mr. Furnell was disappointed at your not meeting on Friday morning as you promised, and that you did not on Monday morning at Wood's Hotel. He, however, met Joseph Cawley on Saturday at the Pantechmicon, who forwarded us two bedsteads, as a set-off against our amounting to about 35*l.* (particulars of which were then sent, one a half-tester bedstead, with good white chintz marked 18*l.*; the other a spiral four-post bedstead, with oak furniture, and a mattress, marked 22*l.* These you pack carefully, and deliver not later than Thursday 10th instant (earlier if possible), at Chamberlain's. If this is not punctually complied with, we shall be compelled to take steps unpleasant to all parties. Please inform your brother of the subject of this



CAWLEY letter, and advise us when the bedsteads are delivered at the wharf.

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"We are, Sir, your obedient servants,

"FURNELL AND JOYCE."

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No goods being sent, the plaintiffs applied by one Knight, attorney, for payment of the debt. In the month of April, 1845, the plaintiffs received by post a letter, which was put in evidence by the plaintiffs at the trial, and proved to the satisfaction of the County Court judge to have been signed by the defendant, Joseph Cawley. The following is a copy:—

"25th April, 1845.

"Messrs. Furnell and Joyce,

"Gentlemen,—I was much surprised at receiving a letter from Henry Knight this morning, for the recovery of your debt. I must candidly tell you once for all, I never shall be able to pay you in cash, but you may have any of the goods we have at Pantechmicon by paying the expenses incurred thereon, with which they cannot be taken out, as before agreed, when I was in town. You are welcome to issue as many writs as you think proper; but if you continue to press the thing I shall immediately put myself under the protection of the court, &c.

"J. CAWLEY."

It was objected at the trial, that this letter was not duly proved to have been written by the defendant, Joseph Cawley. The witnesses for the plaintiffs, who knew the defendant's handwriting, swore they believed the signature to the letter to have been that of Joseph Cawley, one of the defendants thought the body of the letter was in a woman's handwriting. For the defence, the defendant, Joseph Cawley, swore that the letter and signature were in his wife's handwriting, that he did not know there was such a letter in existence, and he never knew his wife write letters of business before. The judge, however, held the letter to have been sufficiently proved as signed by Joseph Cawley, and gave judgment for the plaintiffs. Notice of appeal was immediately served, and the two points stated for the opinion of this court were:—1st. Whether the action is barred by the Statute of Limitations, or whether the plaintiff is entitled to judgment for 34L 12a. 2nd. Was the letter of the 25th of April, 1845, sufficiently proved to have been signed by the defendant, Joseph Cawley, so as to satisfy the words in the Statute of Limitations, 9 Geo. 4, c. 14, s. 1, namely, "to be signed by the party chargeable thereby?"

(It was arranged between counsel that the case should be argued before the full court, though the Chief Justice is precluded by the statute from joining in the judgment.)

*Udall*, for the appellants.—The first question in this case is whether the debt is barred by the Statute of Limitations; and the second, whether sufficient proof was given, at the hearing of the plaintiff, that the defendant, Cawley, wrote the letter of April 25.

JERVIS, C. J.—The special case states that the hand- proved to the satisfaction of the judge. MAULE, J.— ground for appeal on matter of fact. This letter must as written. You cannot, therefore, raise the second here is sufficient matter of law in this case to require o entertain it, and say whether the letter is sufficient to ebt out of the Statute of Limitations. It lies on the slow to establish the affirmative; he must show that to the 13th of November, 1844, the defendant did which renders him liable to pay this debt. There must art either an acknowledgment of the debt *simpliciter*, or on of it, accompanied by a promise to pay. The evi- efficient to establish this—the letter being, in fact, a pay. [MAULE, J.—The letter is a clear acknowledg- e debt.] Yes, but it contains no promise to pay. There oll of cases, in which a bare acknowledgment without to pay has been held insufficient. One of the latest he point is *Hart v. Prendergast* (14 M. & W. 741.) (b) se, the letter set up as containing a promise to pay was nger than this: (*Tanner v. Smart*, 6 B. & Cr. 603.) (c) e, there was a clear acknowledgment of the debt, and the idered that the question to be decided was, whether it a promise to pay. This case is similar to that of *Routledge* (8 A. & E. 221.) The defendant here says, “Will you he debt in goods, first paying what is due on them at hnicon? if so, I will pay, but not otherwise.” This was to which the plaintiff did not accede, and the defendant e, entitled to the benefit of the statute: (*Morrell v. Frith*, . 403.)

C. J.—Is this a case where an appeal lies at all? (interposing.)—I submit this is a case in which an as not lie. [JERVIS, C. J., referred to a case in this *st Anglian Railway Company v. Lythgoe* (1 Cox, Mac. 80), in which it was doubted whether an appeal lies from r Court in a case where there has not been a trial by jury.] -This is a clear point of law under the Statute of Limi- sing on the facts, and, as such, the proper ground for

The question is, whether the statute bars the claim or is certainly a question of law. As yet there has been from the County Court in a case where there had been MAULE, J.—Have not the parties here left the law and e judge as in a case for arbitration?] It is submitted ourt should not favour the objection that it has not 1, for by so doing it will be defeating justice. There is r of law forming good ground of appeal; and it is con-

case the letter, which was in the following terms, was held insufficient to defeat ‘I will not fail to meet Mr. H. (the plaintiff) on fair terms, and have now a hope haps, a week from this date, I shall have it in my power to pay him, at all n of the debt, when we shall settle about the liquidation of the balance.’ The acknowledgment was, “I cannot pay the debt at present, but I will as soon as sufficient, there being no proof of defendant’s ability to pay.

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tended that as the plaintiff has not shown affirmatively that the defendant made a promise subsequent to November, 1844, sufficient to take the case out of the operation of the statute, the court should hold this appeal well brought, and that the appellant is entitled to judgment.

*Barstow and Willes*, for the respondents.—There was no promise on the part of the learned judge in this case. The defendant might have had a jury if he pleased, and in that way have raised matter of law from matter of fact, and therefore he now have his appeal: (*East Anglian Railway Company v. L.*) As to the question whether the letter is sufficient to defeat operation of the statute, the court will regard it as an acknowledgment *simpliciter*, and if so, a promise will be implied. Evidence was sufficient to bring the debt within six years. 1844 the parties met, and transactions took place which amounted to a payment of part of the account, leaving due the balance which the plaintiff brought. Assuming that to be so, the cause was tried in 1850, that is sufficient, unless the defendant prove to demonstration that six years had elapsed before trial. He has not done that. All we know by the case, as stated by the court, is, that the cause was tried in November, 1850, and it ought to show the date of the commencement of the debt. [JERVIS, C.J.—The judge has found that the parties met in 1844. Yes; but it is not shown at what period of the year they had their meeting. It was the defendant's duty to show at what period the suit commenced. [JERVIS, C. J.—This is not a plaintiff's account stated, but for goods sold and delivered; the defendant therefore, lies on you to show when the suit commenced. CRESSWELL, J.—As the case stands it is for you to show affirmatively that something has been done taking the case out of the Statute of Limitations.] With submission, that is not what the plaintiff objects to the judgment of the court below has to show. The transactions at the meeting in 1844 amounted to a statement of accounts; and as such, the debt being cut down from a large to a smaller sum, there arises a new cause of action for the balance amount, a new consideration being thus created: (*Ashby v. Jefferies*, 1 M. & W. 542; *Clarke v. Alexander*, 8 Scott, N. R. 165; *Wort v. Grinditch*, 7 Q. B. 484.) It is not disputed that the defendant came to an arrangement in 1844. This being so, the court cannot assume that the date when the suit commenced appeared to the County Court judge, and he saw that it was such as did not give force to the statute to bar the debt. The judge having taken the means before him of ascertaining when the account was made between the parties, how can this court, which has no evidence as to when the suit was commenced, say that he was wrong, in law, when he gave judgment for the plaintiff? This court cannot assume, in the absence of a statement as to when the arrangement was made between the parties, that the date was such as to give force to the statute. Under these circumstances submitted, first, that the appellants have no *locus standi* before

and, secondly, that the respondents are entitled to the aid of the court, on the ground that the admission made by the defendant was within six years of the commencement of this action, it being the duty of the appellants to supply the court with information as to dates. But if the court should think that this date being uncertain, owing to non-mention of it, the court will not assume it was such as to give effect to the Statute, particularly as the judge of the County Court had the opportunity of ascertaining the dates, and he ruled that the Statute of Limitations did not bar the claim.

*In reply*, referred to *Smith v. Page* (15 M. & W. 683.)  
 The Court, C. J.—As the court, according to the statute, must not give judgment in Term, let the case stand for judgment on appeal.

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#### JUDGMENT.—June 21.

MR. J., now delivered judgment.—This case came before the court on an appeal from a decision of the judge of the County Court for Dorsetshire, upon a case which was tried by him without a jury, and he has stated a special case, giving judgment for the plaintiff.

The special case, as stated, shows that the debt, out of which the action was brought, was proved or admitted, and that the defendant pleaded the Statute of Limitations, and the question argued before us was, whether the facts stated in the special case take the case out of the Statute of Limitations? The judge who tried the cause thought that they did, and accordingly gave judgment for the plaintiff. A question has also arisen, which was argued by the learned counsel, whether an appeal lies at all on a case in a County Court where the parties did not either of them require a jury, but the judge to decide both the law and the facts of the case? It depends on the 14th and 15th sections of the last County Courts Act (13 & 14 Vict. c. 61), which provides, "That if either party in any cause of the amount to which jurisdiction is given to the County Court by this act, shall be dissatisfied with the determination or direction of the said court in point of law, or upon the admission or rejection of any evidence, such party may appeal from the decision to any of the Superior Courts of Common Law at West-  
 minster, two or more of the puisne judges whereof shall sit out of the County Court as a Court of Appeal for that purpose." The question then is comprehended within the terms "shall be dissatisfied with the determination or direction of the said court in point of law," in the present case does not arise on the improper admission of evidence. The natural application of the words "dissatisfied" early mean dissatisfaction with the determination of the point of law, when the court had nothing but a question of fact to determine, such as is the case on a special demurrer, or on a motion for judgment, consistent with the practice of the court, may be adopted, and where the judge decided a matter of fact, either party was dissatisfied with his decision; as if, for

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instance, the defendant admitted the cause of action, but set up a defence that the cause of action did not arise within three years and the plaintiff successfully contended that was no defence. That would be a determination in point of law. So, also, when the judge directs the jury on a point of law, and either party dissatisfied with his direction, an appeal is given to the court above. But where the parties do not choose to separate law and facts, but leave the judge who tries the cause to determine both, it may be very much doubted whether the parties do not, by taking the course, except themselves from the words of the enactment, and its spirit also, and place the judge in the position of an arbitrator whose award is final. It may be said that this would be an absurd construction to say that the statute in such a case gives no appeal; but I do not think that is so, by any means, as parties very often find it convenient to take that course, which clearly excludes such an appeal. So it may be possible that there may be a line drawn which will not exclude every possible case for appeal in which the judge of the County Court has tried the cause without a jury, but which does exclude some cases of the same description. After a very attentive consideration of the case we are of opinion that the judge of the County Court has come to a wrong conclusion. If we are wrong in thus giving judgment for the defendant, it is some satisfaction to know that the judgment may be reviewed, on error, or by action brought; but as we entertain an opinion in favour of the appellants in point of law, our judgment must be for them. I may observe that this is a very peculiar court. The act of Parliament by which it is constituted says, "Two or more of the puisne judges of one of the Superior Courts shall sit out of Term as a Court of Appeal, and the court is to determine the appeal as it thinks fit, and to order judgment to be entered for either party, as the case may be, and may make such order as to costs as they may think proper; such order shall be final. The chief justices are altogether excluded, and the court is incapable of sitting in Term time. The thing that comes nearest to this court is the power given to two or more judges to review the decisions of the Commissioners of Taxes, in which cases, instead of giving a judgment at length, it is customary simply to state that the judges are of opinion that the decision of the judges below are right or wrong, as the case may be. The Legislature seems to have very guardedly framed the act, so as to prevent these courts deriving the advantage which they otherwise would receive from the higher order of judges, namely, the chief justices; but the custom has for centuries prevailed, when the judges have deliberated upon any case of sufficient importance as to require a grave decision, that they have given their reasons for the opinions they entertain, although the actual judgment of the court may consist of only a few formal words. But as the Legislature have so enacted, the court must abstain from giving any reasons at all for their judgment; and have only stated the reasons I have expressed for the purpose.

ing the doubt which existed in our minds as to our having jurisdiction at all, though we have assumed that we have. earned puisne judges think, with me, that the judgment below wrong, and we order judgment to be entered for the defendant; e make an order for the costs of the appeal.

*Judgment for the appellant.*

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## BAIL COURT.

June 17, 1851.

(Before Mr. JUSTICE WIGHTMAN.)

*Ex parte* CARREY.

*County Court—Prohibition—Malicious Prosecution.*

*ordered by the plaintiff and particulars in an action in the County Court, that the cause of action was stated to be for "having arrested the wife of the plaintiff, and maliciously charged her with stealing a shawl," &c.:*

*that this was a proceeding for a malicious prosecution, and not an arrest, and that prohibition ought to go.*

[It was a rule *nisi* for a prohibition to the judge of the County Court of Southwark, to prevent him from further proceeding in a certain cause of *Jones and Wife v. Carrey and Wife*, on the ground that the action was for a malicious prosecution, and, therefore, came within the 58th section of 9 & 10 Vict. c. 95. The rule was taken before the judge of the County Court, but he held that he had jurisdiction, and gave judgment for the plaintiff, costs, 10*l*.

The summons stated that the defendant was summoned "to appear before the plaintiff in an action of *tort*; for that your wife had arrested the wife of the plaintiff on the 25th of March, 1851, maliciously caused her to be wrongfully charged with stealing a shawl, and conveyed her from her house to the station, and caused her to be locked up and detained in custody at and in the prison in the borough of Southwark, &c., until the sitting of the County Court on the 26th; and further caused the said plaintiff, Jones, and another party, to be bound in recognizances for

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the due appearance of the said M. A. Jones at the said court on the 15th of April, 1851, to await any indictment might be found against her." "Whereby," &c.

The particulars were similar to the summons.

*T. Jones* showed cause, and contended that the summons in fact, a good declaration in trespass for the assault, and averment of malice, and, therefore, that prohibition ought go, as it was clear the judge had jurisdiction over the assa that the court would assume that his judgment was given plaintiff for the assault, and not the false imprisonment was merely charged to aggravate the damages.

*M. Dawson*, in support of the rule, contended that it w the gist of the summons was the malicious prosecution, a no assault was charged but a constructive one, in convey plaintiff, *M. A. Jones*, to the police station.

*WIGHTMAN, J.*, said, that the question was, whether th in this case was wholly or in part for a malicious prosecuti upon reading the plaint, it certainly did *prima facie* appe for a malicious prosecution; but it is said, that an as charged in it, and that it is to be taken that the judg the County Court went upon the charge of assault, and t other matters were merely brought before the court by enhancing the damages, but I am not aware of any gro which that can be supported. The judge did not decide t case was not one of malicious prosecution, but simply t had jurisdiction, and he gave a sum of 10*l.* as damages. upon the plaint and the affidavit it seems clear to me that t a proceeding for a malicious prosecution, and, therefore, t must be absolute for the prohibition.

*Rule ab*

## COURT OF COMMON BENCH.

*May 28 and June 17, 1851.*

DEWES v. RILEY.

*County Court—Liability of clerk upon an invalid commitment—  
Pleading—Evidence of proceedings.*

*An order of a judge, on a judgment summons, to pay at a future time, or to be imprisoned, is bad.*

*A minute of the proceedings of the court kept by the clerk, in pursuance of sect. 111 of 9 & 10 Vict. c. 95, or a copy thereof, is conclusive evidence, and cannot be contradicted by the evidence of the judge of the court.*

*A clerk of the County Court is a ministerial officer, and is not liable in trespass for imprisonment on a warrant made in pursuance of a valid order of the court; and in an action of trespass against him he may plead the general issue, and give the special matter in evidence, under 13 & 14 Vict. c. 61, s. 19.*

**TRESPASS** for false imprisonment.

*Plea.*—Not guilty by statute.

At the trial before Maule, J., at the Middlesex Sittings in Easter Term, it appeared that one Davis recovered, in the Whitechapel County Court, 3*l.* 17*s.* debt, and 14*s.* 4*d.* costs, against the present plaintiff, which sums were ordered to be paid by monthly instalments of 5*s.* each, commencing on the 23rd August, 1850. A judgment summons was issued upon default in the payments, and the plaintiff not appearing to it, the judge (October 10) made an order, a minute of which was entered up by the clerk, and after stating the amount claimed, and judgment, it proceeded, under the said "Order":—"On the 17th October instant, or thirty days' imprisonment for not attending." Upon noncompliance with this order, the present plaintiff was arrested on the 5th October, 1850, by a County Court bailiff, upon a warrant of commitment under the seal of the court, and signed by the defendant as clerk of the court. The warrant, after reciting the judgment and judgment summons, stated that "it was ordered by the judge of the said court that the said defendant should pay the said debt and costs, together with the costs of the above-recited summons, and the hearing thereon, amounting together to the sum of 5*l.* 2*s.* 8*d.*, on the 17th October then instant, or be committed to, &c., for the term of thirty days," &c. The judge of the County Court, who was called as a witness, proved from a private memorandum made at the time of the order, that he intended the order to be for



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a commitment forthwith, but not to be enforced till after 17th October. A verdict was directed for the plaintiff, with leave reserved to the defendant to move to enter a nonsuit.

April 30.—A rule nisi having been accordingly obtained,

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*Humfrey* (with him *Skinner*) showed cause.—First, the order being in the alternative to pay on a future day or to be imprisoned is bad: (*Kinning v. Buchanan*, Cox, Mac. & Herts. 375; *Al v. Dale*, Cox, Mac. & Herts. 417.) Secondly, the defendant, clerk of the court, is liable for the imprisonment. The clerk issued the warrant (9 & 10 Vict. c. 95, s. 102), signs it, puts the seal of court to it, and receives a fee upon it. He is to cause a note of orders, &c., to be entered in a book, for the purpose of evidence (sect. 111.) Here the judge's evidence shows that he intended the order to have been to pay forthwith, in accordance with *El Moule* (Cox, Mac. & Herts. 408); and the entry by the defendant clerk, differs therefrom. This entry, on which the warrant of commitment proceeded, was made erroneously by the clerk, and not, in fact, the order of the court, according to its terms. The clerk cannot shelter himself from his own misconduct in this case (*Andrews v. Morris*, 1 Q. B. 3.) [JERVIS, C. J.—In that case the clerk took it into his head to act without the authority of the commissioners.] Here the judge had no power to make an order in the alternative, and the clerk cannot justify under it: (*Clark Woods*, 2 Ex. 395.) The act of the bailiff is the act of the clerk by whom the bailiff was put in motion: (*Bryant v. Chad*, 1 M. & W. 408; *Cobbett v. Grey*, 4 Ex. 729.) Thirdly, the defendant was not entitled to plead not guilty by statute, and on the special matters in evidence, under 13 & 14 Vict. c. 61, s. 1, but he should have pleaded them if they amount to a justification. That clause is expressly for the protection of the high bailiffs, and there is nothing to bring the clerk of the court within it.

*W. H. Watson* and *Manisty*, in support of the rule.—The defendant is not liable. If the judge orders an imprisonment, the clerk is bound to issue his warrant upon it, and if the judge exceeds his jurisdiction, he is liable as a trespasser, but not the clerk of court, who is only a ministerial officer: (*Buron v. Denman*, 21 167.) The imprisonment is the act of the court. But if the judge had jurisdiction, and made an erroneous order, a person enforcing it is not liable as a trespasser: (*Bushell's case*, 1 M. 119; *Hammond v. Howell*, 2 Mod. 218.) If the entry in this case is erroneous, it does not follow that the clerk is a trespasser (*Whitelegge v. Richardson*, 3 B. & B. 131; *Calder v. Hall*, 3 Mood. C. C. 28; *Cooper v. Harding*, 7 Q. B. 928.) Secondly, the defendant is entitled to plead the general issue and give the special matter in evidence.

The COURT intimated that they were of that opinion.

*Cur. adv. vult.*

## JUDGMENT.—June 17.

Mr. C. J., now delivered the judgment of the court, and, stating the facts as above, proceeded as follows:—By the 95th section of the Act, the clerk is directed to cause a note of the proceedings of the court to be fairly entered in a book, and a copy of such entry, duly authenticated, is at all times to be produced, and evidence of such entry, and of the proceedings to be by such entry, and of the regularity thereof. We are of opinion, therefore, by the copy of the entry so produced, and must be satisfied that the evidence given by the judge, that the present plaintiff should be imprisoned for not attending, unless he paid the debt and costs on the 17th of October. According to the decisions of the Court affirmed in this respect by the Court of Error, this was a regular proceeding; but it is correctly stated in the warrant produced, and the question is, whether the clerk of the court is liable in trespass. We are of opinion that he is not. By the 102nd section of the Courts Act, “where any order of committal shall have been made, as aforesaid, the clerk of the court shall issue, under the seal of the court, a warrant of commitment,” &c. It is said that the words, “as aforesaid,” by reference to the preceding words, require that the order should be in compliance with the provisions of the act, and that this section is not obligatory upon the clerk where the order is bad, and cannot be sustained. This is, in our opinion, the correct construction of the act. It would be to impose upon the clerk the duty of reviewing the decision of the judge, a superior officer. The clerk is a mere ministerial officer, and is to execute the order of the judge, and cannot be liable in trespass for the mere performance of his duty, cast upon him by the language of the act of Parliament. The case of *Andrews* is distinguishable in several material respects from the present case, and does not conflict with our decision. In that case, the Court empowered the Commissioners of the Court of Common Pleas, if they made an order or decree for the payment of a sum of money forthwith, to award execution against the body or goods of the defendant, and thereupon the act required the clerk of the court to issue a precept under his hand and seal, by way of return, &c. If the commissioners thought fit to order payment by instalments, they might do so; and, if they adopted this course, the execution of execution was to be made only in case of failure in the payment of an instalment, and proof of that failure, upon which the commissioners present in court were empowered to award execution in manner aforesaid for the unpaid residue of the debt, and such further costs as to them should seem just and reasonable. It is clear, therefore, that, under that act, execution might lawfully be awarded, after an order to pay by instalments, until proof had been made of the default before the commissioners present in court, who were to exercise a discretion. In fact, no proof of default had been made before the

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commissioners, and they had made no award of execution words, "or execution to issue," at the end of the order payment by instalments, are clearly no award of execution silent as to the mode of execution, and the amount of a sum of money or the costs for which it should issue, but to no more than a warning to the defendant, that in disobedience to the order execution may issue against him. The defendant, Morris, therefore, in issuing the precept, acted in any order of the court requiring him to issue it; and although it appeared that a practice had prevailed, with the concurrence of the commissioners, that the clerk should issue a precept in such a case, without any order, the defendant, in issuing it, was not acting as a power which the commissioners could not confer upon him. In *Andrews v. Morris*, also, the precept was under the hand of the defendant, and by that order the defendant requested the serjeant to arrest the plaintiff; and if it had been made, it would have been correct; but, in fact, there was no such order of the court, and the defendant, therefore, had, in terms, ordered the arrest of the plaintiff without any authority to do so. In the present case, the order of the court, as it appears by the minute, is, that the plaintiff shall be imprisoned thirty days if he do not pay 4*l.* 11*s.* and 11*s.* 4*d.* costs, on the 17th of October. The warrant bears the seal of the court, and purports to be a command by the clerk, in strict conformity with the minute. It is, indeed, in the name of the defendant as clerk of the said court; but this seems to mean that he attests in that capacity that the warrant is the order of the court whose seal it bears. In *Andrews v. Morris*, the defendant, in his own name, ordered the arrest of the plaintiff, assuming to do so by force of an order of the commissioners; but, in fact, he had made no such order. In the present case, the clerk did, in fact, order the arrest of the plaintiff, and the defendant, in issuing the precept, no more than authenticated the order as being the act of the court. But it was said that the clerk must, at all events, produce the order of the court, to bring him within the 102nd section, and that, for that purpose, the order should have been specially pleaded, in which it was answered, that he was merely a ministerial officer, and that he was not a trespasser, even though the judge had so ordered; and that he was well defended under the general issue, and that it was unnecessary to decide this question. The plea upon the issue was not guilty by statute. And 13 & 14 Vict. c. 61, s. 19, applies to this case, and allows the defendant to plead the general issue, and give the special matter in evidence. Although the object of that section is to protect high bailiffs and their clerks, it applies to actions brought against clerks jointly with high bailiffs, and enacts generally, that if any action shall be brought against the defendant or defendants shall and may plead the general issue, and give the special matter in evidence. For these reasons, the court are of opinion that the rule for a nonsuit should be made

*Rule a*

## COURT OF QUEEN'S BENCH.

INGS AT NISI PRIUS AT WESTMINSTER AFTER TRINITY TERM.

June 24, 1851.

(Before LORD CAMPBELL, C. J.)

ESTOB v. WRIGHT AND OTHERS.

*Notice of action—Court—Cause of action—Special damage.**A notice of action to the clerk and bailiffs of a County Court stated that an action would be brought in the Court of Common Pleas:**which could not support an action in the Court of Queen's Bench.**The cause was for breaking plaintiff's house, and taking furniture without expressly claiming the furniture as belonging to the plaintiff.**It was stated that it would not support an action for breaking the plaintiff's house and for taking her goods.**The notice should state the special damage, if any is to be claimed, in the declaration.**If execution issues from the County Court against the goods of A, and the goods of B. are taken, and his house is broken by mistake, the clerk and bailiffs are, under 9 & 10 Vict. c. 95, s. 138, entitled to maintain an action.*

There was an action of trespass for breaking and entering the plaintiff's house, and for seizing her goods. The defendant pleaded, not guilty by statute; the defendants Golds- and Pegler pleaded not guilty, not possessed of the goods, not possessed of the doors, and a justification under a warrant of the County Court.

Goldsmith was the clerk of the Bloomsbury County Court, Goldsmith the high bailiff, and Pegler the deputy bailiff of the same County Court. Execution issued from that court against the goods of the plaintiff's father, and it was now alleged that they had taken the goods of the daughter under that execution.

Mr. Serjeant, Q. C., objected to the notice of action which was filed in evidence by the plaintiff, in the first place, because it was a notice of an action to be brought in the Court of Common Pleas instead of the Queen's Bench. Secondly, 9 & 10 Vict. c. 95, s. 138, required notice in writing of such action, "and of the cause thereof," to be given; and, doubtless, the object was to make a declaration of amends might, under the same section, be made

ESTON  
v.  
WRIGHT  
AND OTHERS.

1851.

Notice of action  
—Court—  
Cause of action  
—Special  
damage.

for the whole cause of action. Here the action was for the plaintiff's house, and for seizing her goods, claiming them as the goods of the plaintiff, whereas the notice was of breaking the plaintiff's house and taking furniture therein, claiming the furniture as belonging to the plaintiff. The therefore, no notice of action as to the goods, and the defendant could not, therefore, tender amends in respect of the whole of action. Thirdly, in the declaration and particulars, 47 claimed as special damages for hiring other goods in the those seized, for the consequent loss of a lodger, and for losses. But in the notice no special damage was mentioned: defendants could not, therefore, with effect have tendered. On these grounds the notice was bad; it must be construed: (*Lovelace v. Curry*, 7 T. R. 634.)

*Shee*, Serjt., contra.—The alteration of the title of the was a mere accidental omission in the copying, and it did not mislead the defendants. The act required notice of the and of the cause thereof, to be given; it was not necessary the court, and though stated erroneously, it was not binding.

LORD CAMPBELL, C. J.—You are to give notice of action—that is of *this* action. Have you given notice of action in the Court of Queen's Bench? There may be action pending in the Court of Common Pleas to which notice applies.

*Shee*, Serjt.—The statement is surplusage. The court not be specified. Then, as to the second objection, seizure of goods is stated in the notice of action to be part of the of action; it will be intended to mean the goods of the plaintiff.

LORD CAMPBELL, C. J.—That also appears to me a serious objection. When I was at the bar, we always made the notice a copy of the declaration.

*Shee*, Serjt.—A shorter form is now in use. It is stated the goods were in the plaintiff's house. Surely it will be intended that the plaintiff claimed for seizing of those goods, as by its own. As to the special damage, it is not necessary to state the notice.

LORD CAMPBELL, C. J.—Have you any authority for that you may lay special damage in your declaration which mentioned in the notice?

*Shee*, Serjt.—Notice is required only of "such action, the cause thereof." Special damage cannot be said to be "cause of action." *Jones v. Bird* (5 B. & Ald. 837), shows that notice is sufficient.

*Ogle* and *Pearson*, on the same side, contended that the object of the notice was to enable the defendants to tender amends, and that it must, therefore, be quite immaterial whether the action was in the Queen's Bench or Common Pleas, if the defendants could not be injured by the mistake. That the goods were sufficiently shown in the notice. If so set out in the declaration, it would have been good on general damages.

and, in all probability, even on special demurrer, and that it was not necessary to claim in the notice for special damage. It was not a cause of action, but a consequence of the cause of action. It was not stated in the authorized precedents.

*Pearson* further contended that no notice was necessary in this action.

**LORD CAMPBELL, C. J.**—There is an issue joined upon it.

*Pearson*.—It is an immaterial issue, *Munday v. Stubbs* (20 L. J. C. P.) was in point.

**LORD CAMPBELL, C. J.**—There is an issue to be tried, whether material or not is not now in question—that will be a matter for subsequent consideration of the court. I am, however, strongly of opinion that it is material—and if due attention is paid to sect. 138 of the statute, it seems to me impossible to contend that it is immaterial. As to the notice, it is clearly bad. The action is in Her Majesty's court, before Her Majesty herself, at Westminster, and the notice is of an action in Her Majesty's Court of Common Pleas. There may be at this moment such an action. At any rate the notice cannot apply to the present action. I think it also bad because it studiously avoids claiming the goods as the goods of the plaintiff, whereas the declaration claims them—a different cause of action is, therefore, inserted, and a plea, if made only for the cause of action stated in the notice, for breaking the house, would not have been sufficient. There is also much in the objection as to the non-statement of special damage. How would a tender be made? I am of opinion that this is not such a notice as is required by the act. The act must be for the defendants.

The case, notwithstanding, proceeded, in order to ascertain the result of the other issues, and the jury ultimately found for the defendants on all the issues.

*See, Serjt., Ogle, and Pearson, for the plaintiff.*

*Watson, Q. C., and Hugh Hill, for the defendant Wright.*

*Amfrey, Q. C., and Lush, for the other defendants.*

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v.  
WRIGHT  
AND OTHERS.

1851.

Notice of action  
—Court—  
Cause of action  
—Special  
damage.

## COURT OF EXCHEQUER.

July 10, 1851.

CLAY v. CROFTS.

*County Court appeal—Prospectus—Agreement stamp—Constru*  
*55 Geo. 3, c. 184.*

*The printed prospectus of a school was handed to the defendant  
 terms of the contract between him and the plaintiff, except  
 amount to be paid was altered:*

*Held, that it did not require an agreement stamp under 55  
 c. 184.*

**T**HIS was an appeal from the decision of the judge  
 County Court of Dunmow, in Essex. The action  
 brought to recover the sum of 31*l* 10*s*., and was tried by  
 jury. The particulars of demand were as follows:—

|                                                       |         |
|-------------------------------------------------------|---------|
| 1850. For fee, in lieu of three months' notice of re- | £       |
| removal of his eldest son at Michaelmas last          | - 13    |
| For ditto of his younger son at Christmas last        | 16      |
| Balance of books, for younger son, from               |         |
| Michaelmas to Christmas                               | - - - 2 |

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It appeared that in 1849, a Mr. Fairer called upon the plaintiff to inquire the terms of his school, as he said the defendant had placed his sons there. A prospectus was handed to him, which stated that the terms, including board and washing, were sixty guineas per annum, and that boys were admissible at eight years of age, on payment to be made quarterly, and three months' notice, in writing, was required, previously to the removal of a pupil; but an arrangement was made, that so long as the defendant's two sons remained together at the plaintiff's school they were to be charged for at the rate of fifty guineas each. The boys were sent to the school on those terms, and in 1850 were removed without notice, one at the Michaelmas quarter, and the other at the Christmas quarter. The plaintiff stated in his evidence that he understood the prospectus to represent the terms of the agreement in every respect, except the amount to be paid. The defendant objected to the reception of the prospectus in evidence, on the ground that it required a stamp. The judge received the evidence, and a verdict was returned for the plaintiff.

he question for the opinion of the court was, whether the prospectus required to be stamped as an agreement.

*ush*, for the appellant, contended that this case was not distinguishable from *Williams v. Stoughton* (2 Stark. 292); that case never been overruled, and it decided that a prospectus is the us of the agreement between the parties, and that it requires imp. [PARKE, B.—This is a proposal merely. MARTIN, B. cannot be taken as more, for I see that the terms were afterwards altered, and the amount ultimately agreed to be paid was the same as that mentioned in the prospectus.] *Edgar v. Edgar* (1 Stark. 464), the respondent relies on. In this case there is a strong piece of evidence which is wanting in that case, the prospectus was here actually handed to the defendant as the terms of the contract. The respondent says in his evidence, "I always understood that the prospectus contained the terms of our agreement, except so far as related to the price." The Stamp Act directs "that every agreement, or any minute or memorandum of agreement, where the value thereof shall be of the value of £10 or upwards," shall be stamped. [MARTIN, B.—Yes, but Parke, J., very well explains that clause in the case of *Vaughton v. Vaughton* (a) (1 S. N. R. 258)]; he referred also to *Southgate v. Bohn*, *Knight v. Barber* (16 M. & W. 34, 66); *Drant v. Brown* (10 M. & C. 665); and *Beeching v. Westbrook* (8 M. & W. 411.) *Illes*, contra, was not called upon.

PARKE, B.—We are of opinion that this is nothing but a proposal for an agreement, the terms of which were afterwards to be agreed between the parties. Notwithstanding the terms of the Stamp Act (55 Geo. 3, c. 184), which says that any minute or memorandum of an agreement made in England under hand only, whether the same shall be only evidence of a contract or obligatory on the parties from its being a written instrument, &c. I think that clause applies to cases not only where the document is signed, but where it also contains the actual terms of the agreement between them. Here the paper is not signed, and the terms of the agreement were altered so far as related to the price to be paid. The judgment will, therefore, be affirmed with costs.

*Judgment affirmed, with costs.*

Macle, J., in his judgment in that case, after reading the clause referred to, said—  
"is any minute or memorandum that substantially amounts to an agreement."

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v.  
CROFTS.  
1851.

Appeal—  
Prospectus—  
Stamp.



## BAIL COURT.

November 17, 1851.

(Before ERLE, J.)

MILNER v. RHODEN.

*Mandamus.*

*Where the judge of a County Court, after having heard the case, nonsuits the plaintiff, on the ground that he has not given that is such a decision on the facts that this court will not in mandamus, even though the judge was wrong in his view of the facts. Where a company is formed, and afterwards it is agreed that the object of the company shall be changed from their original object, the fact that the company has been so changed will not entitle a dissentient member to recover back his deposit.*

**K**ENEALY moved for a rule calling upon the judge of the Shire County Court, holden at Madeley, to show cause why a writ of mandamus should not issue, commanding him to hear and determine a plaint wherein Richard Child Milner was plaintiff, and Rhoden was defendant. It appeared that in the year 1849 the defendant issued a prospectus, for the purpose of forming a benefit society, to be called "The Fountain of Friendship Society," and to be a branch of the Manchester Unity of Odd Fellows; which last-named society has branches throughout the whole of England, and has the peculiarity, that a member of one branch of the said Manchester Unity is absolutely entitled to the benefit of money, relief, hospitality, and introduction to any other branch in any other town wherein he may sojourn, through which he may pass, although he may never have personally subscribed or contributed money to the said branch, the branches of the said unity being a brotherhood, and bound by their rules and ordinances to befriend the members of any branch whatever, who may solicit their aid; that the plaintiff placed his faith in such prospectus, and with the distinct assurance that the said proposed Odd Fellow's Club should be a branch of the said Manchester Unity, paid from time to time to the said defendant, who was appointed treasurer, divers sums of money amounting to the sum of 8*l.* 1*s.* 8*d.*; that the said club existed for several years; that in the year 1849 the said defendant and other members of the club, passed a resolution that the club should be altogether changed, and should cease to be any longer connected with the Manchester Unity, and they agreed

uld be a private benefit club, whereof the members should be itled to relief in the town of Wenlock only, and nowhere else; the plaintiff was not a party to the resolution, nor did he ever of it until after it had passed, there being upwards of twenty rs in the same situation as himself, who, with himself, went protested against the change, and withdrew themselves from club, claiming that their subscriptions should be returned, or steable part of the sum of 337*l.*, which was the balance then he bank to the credit of the said club; that the defendant sed to refund any part of the said sum, and that the club is g carried on upon the new principle, but has never been lled under the Friendly Societies' Acts. It further appeared , in August last, the plaintiff took out a summons against the ndant in the before-mentioned County Court to recover the sum of 8*l.* 1*s.* 8*d.* for money had and received; that upon hearing of the said plaint, the foregoing facts have been ed in evidence, it was submitted on the part of the defendant the judge had no jurisdiction to try the question, it being one quity, whereupon it was argued for the plaintiff that the *was* within his jurisdiction: the judge, however, held that he no power to adjudicate, that no liquidated balance had ever struck, and that the question could be determined only in a rt of Equity, and he accordingly nonsuited the plaintiff with nt, postponing, however, their payment until after the 19th nt, to give time to make the present application.

was now contended that the judge was wrong, and that he jurisdiction to hear the plaint, and that this case came within principle laid down in *Nockells v. Crosby* (a) (3 B. & C. 814); *Tab v. Spottiswoode* (15 M. & W. 501); and *Reg. v. Richards* L. J. 351, Q. B.)

BLE, J.—The ground upon which you ask for this rule is tenable. In cases where the Inferior Court has had all the before the judge, and he decides upon those facts, this court not interfere; and even assuming that he was wrong in point aw, I could not interfere. The distinction between this case that of *Reg. v. Richards* is this, that there the judge decided net the party upon a preliminary point, and did not go into merits; and where that is the case, this court will interpose authority by *mandamus*. But here I think the plaintiff had no t of action. The distinction is this,—when a company is emplated, and deposits are made in expectation of the company ing into existence, the depositor has a right to recover back deposit if the company is not formed; that is the effect of the cited. Here this was not a company which was not actually

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v.

RHODEN.

1851.

Jurisdiction—  
Mandamus—  
Right of action.

(a) In that case a scheme for the establishment of a Tontine was put forth, stating that money subscribed was to be laid out at interest, and after some subscriptions had been the directors in whom the management of the concern was vested, but before any part of money was laid out at interest, the directors resolved to abandon the project. And it held that each subscriber might, in an action for money had and received, recover the of the money advanced by him, without the deduction of any part towards the payment of expenses incurred.

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RHODES.  
—  
1851.  
—  
*Jurisdiction—*  
*Mandamus—*  
*Right of action.*

formed, for it had really been in existence from 1841 to 1851, but the company passed a resolution which defeated the purpose for which the plaintiff had become a member; therefore there was no good reason for saying that there was a dispute between partners. I am, therefore, clearly of opinion that if the judge had gone more fully into the question, he would still probably have decided against the plaintiff. The rule, therefore, must be refused.

*Rule refused.*

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## COURT OF EXCHEQUER.

November 25, 1851.

CROSS v. SEAMAN.

*Payment into court—Costs—13 & 14 Vict. c. 61, s. 11.*

*The plaintiff recovered 18l. by verdict, and took out of court 7l. paid in on a plea of tender.*

*Held, that the plaintiff having recovered more than 20l. by virtue of the action, was not deprived of his costs by the 13 & 14 Vict. c. 61, s. 11.*

**I**N this case a rule nisi had been obtained to tax the plaintiff's costs.

The plaintiff sued in debt to recover the amount of his costs as a proctor; the defendant pleaded a tender as to 7l. and never indebted to the residue. At the trial, the tender was admitted, and the plaintiff had a verdict on the other issue for 25l. An application was subsequently made by the defendant to enter a suggestion to deprive the plaintiff of costs under the Statute of London Small Debts Act, and refused. (See *Cox, Mac. & H. 438.*)

*Brewer* now showed cause, and cited the cases of *Brooks v. M. (2 A. & E. 21)*, and *Robins v. Cresswell (2 A. & E. 23.)*

*Willes*, in support of the rule, was stopped by the court.

By the COURT.—The plaintiff has got more than 20l., and it is by the action only. The rule must be absolute.

*Rule absolute.*

## INGS AFTER MICHAELMAS TERM.

*December 1, 1851.*

*re MAULE, WILLIAMS, and TALFOURD, JJ.)*

NIELS, Appellant, CHARSLEY, Respondent.

*Security for costs—Notice—Withdrawal—Fresh notice—  
Jurisdiction of court—Costs.*

*ing been recovered in the County Court on the 17th January  
defendant, he, on the 22nd, gave the plaintiff notice of  
1 the day following entered into a bond with a surety to  
its of the appeal, whatever the event might be, and the  
he judgment, if the appeal were dismissed. On the 24th  
w the notice, and subsequently, on the last-mentioned day,  
plaintiff with a fresh notice of appeal, including several  
rounds of appeal, but no fresh security was given.  
is court had jurisdiction to hear the appeal, and judg-  
for the appellant with costs, notwithstanding the terms*

3 an appeal from the decision of the judge of the  
7 Court of Chesham, Bucks, adjudging the appellant  
s. damages to the respondent.  
ndent sued the appellant in the County Court for  
breach of contract, and the following was the state-  
claim in the plaint:—

o of the defendant's breach of contract in rendering  
o other persons than the plaintiff at Amersham and  
ourhood of it, between the 9th January, 1850, and  
rch, 1850, contrary to his agreement with the plaintiff;  
reason of the defendant's breach of contract in not  
remaining in London after the 9th January, 1850,  
re met with another engagement according to his  
undertaking to the plaintiff so to do, made on or  
th January, in consideration of the plaintiff then  
17. 5s. for his salary as clerk to the plaintiff up to the  
y of March, 1850; and also for the defendant's not  
vices to the plaintiff as such clerk as aforesaid, whilst

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v.  
CHARLEY.  
—  
1851.  
—  
*Appeal—Bond*  
*—Notice—*  
*Withdrawal—*  
*Fresh notice—*  
*Jurisdiction—*  
*Costs.*

the defendant remained at Amersham after the said 25th M 1850, as he ought to have done under his promise.

After the hearing of the plaint and decision of the judge of County Court, the appellant gave due notice of appeal, and gave a bond to the plaintiff for the costs of the appeal, an amount of the judgment (13 & 14 Vict. c. 61, s. 14.) condition of the bond was as follows:—"And whereas the Thomas Daniels has given notice to the said Frederick Ch of his intention to appeal against the said judgment—No condition of the above obligation is such, that in case th T. Daniels shall duly *pay the costs of the said appeal, wh be the event of the appeal*, and the amount of the said jud in case the appeal be dismissed, then this obligation shall b and of none effect, otherwise to remain in full force and v At the foot of the bond was written,

"Approved by me, J. D. F.,

"Clerk of the County Court of Buckingham  
at Chesham."

On the 24th of January the defendant gave the following of countermand:—

"I hereby *withdraw the notice* of appeal given by me to y the 22nd January instant."

And on the same 24th January gave a fresh notice of a stating that he was dissatisfied with the determination in p law of the judge of the said County Court, and that he int to appeal against such determination on the above ground also on the ground of the improper admission and reject evidence tendered on behalf of the plaintiff and defe respectively.

The appellant stated his case, and sent it to the responde agree to it (s. 15), but he declined to do so; whereupon appellant sent it to the judge to settle it. The respondent tested against the judge settling it, on the ground tha appellant, not having given fresh security for the costs o appeal and the amount of the judgment, had waived his rig appeal. The learned judge, however, settled the case, appended the following memorandum to the case:—

"This case was sent to me on the part of the defendant, the p tiff having declined to concur in the settlement of it, and he served me with two protests which I have annexed to the insisting that the defendant had waived or abandoned his i to appeal; but conceiving that to be a matter upon which it not proper for me to decide, I have made some alterations in case as sent to me by the defendant, and signed it.

"J. HERBERT KOE,

"Judge of the County Court held at Chesham

sh, for the respondent.—There is a preliminary objection to appellant's being heard. By 13 & 14 Vict. c. 61, s. 14, the law is to give notice of appeal within ten days, and also give security for the costs of the appeal, whatever be the event of the appeal, and for the amount of the judgment. Here the notice of appeal was given on the 22nd January, the appellant entered into bond on the 23rd, withdrew the notice of appeal on the 24th, and subsequently gave fresh notice of appeal on the 24th, together with additional grounds of appeal. The question is, whether this is aailable security, and whether the surety is liable, the condition of the bond reciting the fact of the first notice of appeal, and that it had been withdrawn. The grounds of appeal are now different, and the surety may say this is not the same appeal as that for which he entered into the security. He may be unwilling to prosecute the appeal on the grounds alleged in the subsequent notice. Here the notice of appeal was absolutely withdrawn, and the bond was void.

*Chambers* (J. A. Russell with him) for the appellant.—It is contended that this court has no jurisdiction to entertain such an appeal. This was an appeal, of which notice was given before the new Rules of the County Courts, and the notice was not required to state the grounds of appeal. This is just like a writ case, and all that is required is notice, and the abandonment of one notice of appeal does not destroy the security given by the 14th section.

JULE, J.—We think we may hear the appeal.

*Chambers* then stated the following grounds of appeal:—1. That there was no contract between the parties at all, or, at all events, no contract to the effect set forth in the plaint. 2. That the contract was *bond fide* performed by the appellant. 3. That the respondent failed to recover more than nominal damages, and was bound to prove that some damage had resulted from the breach of contract, whereas, no such proof was given. 4. On the ground of the improper admission and rejection of evidence.

The court, however, decided upon one only,—viz., the first. As this is purely one of evidence, and a question whether, out of a variety of evidence, written and oral, there was any which showed the contract, it is useless to report it; for the case cannot be a *res novus*.

It was heard on the part of the respondent.

*Chambers* applied for the costs of appeal, and referred to the decision of the Court of Exchequer in *Robinson v. Lawrence* (138.)

He opposed, on the ground that the bond was to pay the costs of the appeal, "whatever be the event."

THE COURT.—Judgment to be entered for the defendant, on consideration of the nature of the action, the plaintiff, respondent, to pay to the defendant, the appellant, the costs of the appeal.

*Judgment for the appellant, with costs.*

X X

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v.  
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—  
1851.

Appeal—Bond  
—Notice—  
Withdrawal—  
Fresh notice—  
Jurisdiction—  
Costs.

## COURT OF EXCHEQUER.

SITTINGS AFTER TRINITY TERM, 1851.

ROBINSON v. LAWRENCE.

*Nonsuit—Costs of appeal.*

*An action was brought in the County Court for money had and to which the defendant pleaded a plea of set-off; after the judge had taken time to consider, and before he delivered his verdict, the plaintiff elected to be nonsuited:*

*Held, that there was nothing in the County Courts Act to prevent the plaintiff exercising the common law right he has to withdraw his plea, and that, consequently, he might be nonsuited, and the judge was right in permitting him to be nonsuited.*

*The costs of an appeal from the County Court must follow the result, and the party succeeding will be entitled to the costs.*

THIS was an appeal from the decision of the judge of the County Court of Hertfordshire. The action was brought for the sum of 50*l.*, the plaintiff having abandoned the defence of set-off. The defendant pleaded a set-off. The cause was tried without a jury, and after taking time to consider the judge gave his opinion that the set-off was established, and he informed the plaintiff that instead of having a verdict entered against him he might if he pleased be nonsuited. The defendant objected to this, and ultimately the judge ordered a nonsuit to be entered. Under these circumstances, the defendant appealed from the judge's decision.

*Lush*, for the appellant (July 10), contended that the County Court had no power to nonsuit the plaintiff, as the case had been fully heard. No such power is given by 9 & 10 Vict. c. 95, or the subsequent County Court Act, which alone are the proceedings of these courts regulated by statute. It is important for the defendant inasmuch as if he has judgment in his favour, no further action can be brought.

No one appeared for the respondent.

*Cur. adv. huiusmodi.*

JUDGMENT.—*December 1.*

PARKE, B.—This was an appeal from the decision of the judge of the County Court of Hertfordshire, and was argued by my brother Martin and myself at the sittings after last Trinity Term. It was a question whether or no the plaintiff, in an action for money had and received, to which there was a plea of set-off, after the judge had taken time to consider, and when the judge was about to deliver his verdict, might be nonsuited.

dict, could be nonsuited? The second question was, judge had power to direct a nonsuit according to the act, which regulates the County Courts? We took time for the purpose of investigating the question, and we through the County Court Act, and, in our opinion, ing to take away the common law right the plaintiff law, if he pleases. That is the common law right laid rd Coke: (Co. Litt. 138 b, and 139 a.) At every time ought to appear he may be at liberty to withdraw. casion, when the judge was about to deliver and, indeed, by the permission of the judge, the drew. We do not find any clause contained in the irts Act that prohibits the plaintiff exercising this right. We therefore think in this case the plaintiff suited, and the judge was right in permitting him to ed. Then with respect to the costs of the appeal, en that point also into our consideration, and we have ne of the members of the court and other judges, and f all of them is, that in these cases the costs of the ; to follow the result; if the appellant succeeds, he e the costs; if the respondent succeeds, he ought to s. If the appellant is not to have costs if the judge : effect would be a denial of justice, the costs bearing er a proportion to the debt itself. In this case we n that the respondent is entitled to costs.

*Appeal dismissed with costs.*

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—  
*Nonsuit—  
Costs of  
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## COURT OF EXCHEQUER.

SITTINGS AFTER TERM.

*December 1, 1851.*

WATSON, appellant, v. POULSON, respondent.

*Alleged fraud—Post dated cheque—Costs of appeal.*

*A. bought of B. 118 sheep, and being unable to pay for the whole to C., and agreed to sell him fifty sheep at 1l. each, C. agreeing to give the sheep to A. on the Thursday following, upon being paid 46l. received from C. a cheque, post dated, upon his bankers, for 46l. and gave the same to B. (who could not read) as part payment for 118 sheep. B. presented it, and the bankers refused payment, as post dated, and the day of the date had not arrived. A. not delivering C. the fifty sheep, C. stopped payment of the cheque. B. sued A. in tort in the County Court for defrauding and deceiving whereby he was induced to deliver up his 118 sheep. Verdict for plaintiff, 46l. C. appealed from this decision:*

*Held, there was no case against C., and that the verdict should stand, and a nonsuit entered.*

*The unsuccessful party in the court above, upon County Court appeal, must pay the costs.*

THIS was an action of tort brought in the County Court of Wiltshire, holden at Melksham, by Poulson against Watson one James Sartain. It was tried before Joseph Grace Smith, (the judge), and a jury, on the 14th July, 1851, when a verdict was found for the plaintiff, damages 46l. The defendant, Watson, appealed against that decision; and the following case having been settled by the learned judge of the County Court, was stated the opinion of this court thereon.

On the 2nd of May, 1851, the defendant, Sartain, applied and with some difficulty prevailed upon the plaintiff (the respondent) to sell him 120 sheep, at 25s. a-head, ready money. On the 10th of the same month he called at the plaintiff's residence, saying he came to pay for the sheep, and paid 100l. 10s. in part. On the 14th he came again, and objecting, on inspection to two of the sheep, the agreement was concluded for the purchase of 118. Upon his proceeding to drive them away the plaintiff asked for the remain-

urchase-money, upon which he produced a cheque, saying, Thomas Watson's name, and was for 46*l*. The plaintiff refused to read writing, and said he knew nothing about it to which the defendant replied, that it was good for him and that if the plaintiff took it to the North Wilts Bank it would be good as money. The plaintiff then said, that if it was Watson's he would take it, and the defendant gave him a cheque to make up the amount. On the next day (Tuesday, the 26th) the defendant presented the cheque at the bank; payment was refused, on the ground of its being post dated, and he was to call on the following Tuesday, on which day (the 27th) the cheque bore date. On Monday, the 26th, the defendant, called again on the plaintiff, and begged him to hold the cheque for four or five days, or a week, which plaintiff refused, saying that if he had known the cheque had been post dated it should not have had the sheep. On the 27th the defendant again presented the cheque at the bank for payment and that it was stopped altogether. On the 9th of June the plaintiff saw the defendant Watson (the appellant) (having procured a friend to write to him), and asked what he was to do with the cheque, upon which the defendant, Watson, pulled a paper from his pocket, saying, it was an agreement between him and Sartain, for so many sheep. The plaintiff said he had no do with an agreement which he (Watson) had drawn on his (plaintiff's) property. Watson said he might do as he pleased that he should not pay him. The cheque and agreement were produced and proved. The cheque (written upon unstamped paper) was as follows:

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“Melksham, May 27th, 1851.

North Wilts Banking Company, Melksham. Pay Mr. Thomas Watson, or bearer, forty-six pounds.—46*l*.

“THOMAS WATSON.”

Following is a copy of the agreement:

“Holt, May 19th, 1851.

MEMORANDUM.—I do agree to sell Mr. Thomas Watson fifty sheep for the sum of 1*l*. per head, and Mr. Watson do agree to deliver the sheep to me by my paying him back on Thursday the 26th inst. forty-six pounds.

“JAS. SARTAIN.”

It was proved that defendant, Watson, had been acquainted with the plaintiff for several years, and knew that he was no scholar. It was also proved that defendant, Sartain, had offered the sheep for sale, at 25*s*. 6*d*. a head. Defendant, Sartain, did not deliver the sheep to Watson according to his agreement, and the 46*l*. was wholly unpaid to plaintiff. Upon the trial the following questions were raised by the defendant Watson's attorney:—1. That the summons and particulars disclosed an indictable offence; 2. That the plaintiff could not proceed for damages in an

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action at law until he had first prosecuted the defendants in a criminal court.

2. That the cheque was not void, as alleged in the plea and particulars, but only inadmissible as evidence for want of a stamp.

3. That the cheque was inadmissible in evidence for any purpose whatever, for want of a stamp.

4. That the defendant, Watson, was justified in stopping the cheque, the consideration for which it was given having failed.

The judge overruled the objections, and directed the jury to consider whether the plaintiff had been induced by fraud, contrivance or misrepresentation to part with his property to the defendant, Sartain, for an illegal and void instrument, believed to be an available security, and equivalent to cash. And directed the attention of the jury to the evidence as applicable to the defendants severally presenting a case of gross and premeditated fraud on the part of the defendant Sartain, but affecting the plaintiff as a defendant in a less aggravated form, as to whom, nevertheless, considered, that having made himself a party, from avaricious motive, to a fraudulent transaction, and lent his aid and abetment to the other defendant, so as to enable him to effect a dishonest purpose, at the same time that he protected himself very carefully from risk, he also must be held answerable for the loss actually sustained by the plaintiff; that if the scheme for obtaining money from sheep had been explained to the plaintiff, the defendant must have been aware that he would not have parted with his money and that if the jury were of that opinion, they would return a verdict for the plaintiff as against both defendants.

The questions for the opinion of the court are:—

1. Whether the several objections taken as stated on behalf of the defendant Watson were rightly overruled?

2. Whether, under the circumstances, the judge was right in allowing the case to go to the jury as against the defendant Watson?

And if the court shall be of opinion that the said several objections or such of them as were material, were rightly overruled, and the jury were rightly directed in point of law, then the verdict shall be entered for the plaintiff; but if the court shall be of a contrary opinion, then a nonsuit to be entered.

*Hugh Hill, Q. C. (T. W. Saunders with him), for the plaintiff*—I am quite at a loss to understand what is here the nature of the action, or what the plaintiff's complaint was for; it is in effect a complaint by the appellant with some desire to cheat and defraud the plaintiff in the court below, and the party who drew it must have been thinking at that time about some indictment or other proceeding on the claim, as set out in the plaintiff's note, partakes rather of a supposed criminal charge than anything else; there is no civil action whatever. [*Crowder, Q. C., contra, for the defendant*]. It charges both Watson and Sartain with fraudulently obtaining money and concocting this post-dated cheque for the very purpose

ving Poulson of his sheep. ALDERSON, B.—What case is against Watson? PLATT, B.—Does it appear who stopped cheque? Crowder.—There is no doubt whatever about that; not disputed that it was Watson. MARTIN, B.—Watson, it s, bought some sheep, for which he gave his cheque in ent, and post-dated it, that he might be quite sure of having the o delivered to him before the money was actually paid over; the sheep not having been delivered in the meantime to him, just before it was payable, stopped the payment.] The ed judge of the County Court, it appears, relied upon *Polhill ter* (3 B. & Adol. 114); but that case, upon examination, will ound to have no bearing whatever upon the present. RKE, B.—No; for there the party knew he had no authority, did what was untrue. Where is there any evidence here Watson knew what was to be done with the cheque? We ld like to hear the other side.] (He was then stopped by the )

owder, Q. C. (*Wise* with him), for the respondents, was then d upon.—This case is very extraordinarily stated, and not at all cordance with the act of Parliament giving the right to appeal. case says, if the court should be of opinion that the several tions, or such of them as were material, were rightly over- l, and that the jury were rightly directed in point of law, the ct is to be entered for the plaintiff; but if the court should a contrary opinion, then a nonsuit is to be entered. How a nonsuit be entered when there is a verdict clearly against f the two defendants unappealed from? [PARKE, B.—We ourse give our judgment according to what is right and stent with the act upon the case as submitted to us.] The dant Watson was guilty of the fraud as charged against him, h the jury found, and it was for them to decide. [PARKE, B. re there any words here from which we can infer fraud as st Watson, as we must not otherwise infer fraud without statement of it? ALDERSON, B.—If the sheep had been ered to Watson, no doubt the cheque would have been duly ] Fraud is stated, and the jury believed it was proved by g their verdict for the plaintiff. *Polhill v. Walter* was, no t, a case relied upon by the learned judge, and it appeared a case somewhat resembling the present in respect of the l charged. (He then read and commented upon that case )

RKE, B.—There was no fraud, it appears from this case, in ransaction as against Watson, and I doubt very much if was any whatever against Sartain; the cheque was not a ie upon a bank where Watson had no account, and if the , had been delivered to him, according to the sale and ise for which he gave the cheque, no doubt it would have duly paid; the action should have been for goods sold delivered. *Polhill v. Walter* is entirely inapplicable to this

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ALDERSON and PLATT, BB., concurred.

MARTIN, B.—I am also of the same opinion; there was no whatever here upon the supposed cause of action set out in the against either Watson or Sartain; and, according to the rule have laid down in County Court appeal cases, the unsuccessful party must pay the costs.

*The verdict to be set aside, and a nonsuit entered.*

## COURT OF COMMON PLEAS.

*November 24 and December 5, 1851.*

MACDOUGALL v. PATERSON.

*Concurrent jurisdiction—Dwelling of plaintiff—Costs—Discretionary power—9 & 10 Vict. c. 95, s. 128—Construction of 13 & 14 Vict. c. 61, s. 13.*

*The court or a judge at chambers has not a discretionary power under 13 & 14 Vict. c. 61, s. 13, but an authority is thereby conferred on them if they are bound to exercise by giving the plaintiff an order for costs in either of the three cases in which, by that section, a jury is given to make such order; overruling Jones v. Harrison (ante). Where the plaintiff has a permanent dwelling more than twelve miles from the defendant, the Superior Courts have concurrent jurisdiction under the 9 & 10 Vict. c. 95, s. 128, although the plaintiff has lodgings for a temporary purpose, at the time the action is brought within twenty miles of the defendant.*

*Semble, that if a plaintiff has two dwellings, one within twelve miles of the defendant, and the other more than that distance, the Superior Courts have concurrent jurisdiction.*

THIS was an action against the maker of a promissory note which was tried before the under-sheriff of Middlesex in the last, when the plaintiff obtained a verdict for a sum less than £100. An application was made to Patteson, J., at chambers, under 13 & 14 Vict. c. 61, s. 13, for an order directing that the plaintiff might recover his costs, when it appeared by the affidavits on both sides that the plaintiff resided at Inverness, in Scotland, and that his permanent dwelling was, but that every year, before the shooting season, he came to London, where he took lodgings for his business, and that during the present year, at the time the action was brought, he had a stand at the Crystal Palace Exhibition, and resided in Golden-square, London, which he used also for a place of business, and where he was from May to October last. The learned judge at chambers thought that the plaintiff had shown that he dwelt more than twenty miles from

nt, and that, therefore, the case was within the concurrent jurisdiction. But, considering that he had a discretion under 9 & 10 Vict. c. 61, s. 13, he refused to make an order giving the plaintiff his costs, and indorsed the summons as follows:—  
 "Summons dismissed: I think there was concurrent jurisdiction, and sufficient reason given why the plaintiff sued in the County Court." A rule *nisi* having afterwards been obtained in the County Court, calling upon the defendant to show cause why the Master should not tax, and allow to the plaintiff his costs.

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(November 24) showed cause.—1. The court or judge has discretion to allow or disallow costs. The case of *Jones v. Harrison* (20 L. J. 166, Ex., ante, p. 489) is an express decision to that effect. That case was followed by *Palmer v. Richards* (20 L. J. 302, Ex.), where the Court of Exchequer held to their previous decision. *Jones v. Harrison* was also approved of and adopted by the Court of Queen's Bench in *Latham v. Spedding* (20 L. J. 302, Ex.). [JERVIS, C. J.—That was not a decision on this point.] The plaintiff dwelt, at the time the action was brought, less than twenty miles from the defendant, for he was then dwelling in Golden-square, London, and it mattered not that at another time of the year he dwelt in Scotland.

The learned judge, contra.—With respect to the last point, the learned judge in chambers was of opinion that the plaintiff had sufficiently shown that it was a case in which the Superior Courts had jurisdiction. The question is, where the permanent residence of the plaintiff is? not where he comes for a short time to suit a particular purpose: (*Nias v. Davis*, 4 C. B. 444.) [MAULE, J.—If a man has two dwellings, a dwelling in London and a dwelling in Scotland, he does not less dwell more than twenty miles from the defendant, because he also dwells less than twenty miles from him; and may he not, therefore, be entitled to the costs? If a man who dwells more than twenty miles from the defendant, although he also dwells less than twenty miles from the defendant, As to the other point, the Statute of Gloucester gives the plaintiff his costs, and nothing but the express words of an act of Parliament can deprive him of his right. The words of 13 & 14 Vict. c. 61, s. 13, do not amount to a repeal of the Statute of Gloucester, and the plaintiff's right to costs still exists: (19 Viner's Statute," 525; *R. v. Barlow*, 2 Salk. 609; and *Alderman v. Alderman*, 1 Vern. 52, were cited.)

*Cur. adv. vult.*

JUDGMENT.—December 5.

JERVIS, C. J.—The first question in this case is, whether this is a concurrent jurisdiction with the County Court, under 9 & 10 Vict. c. 61, s. 13; and we are of opinion that it has. The defendant contends, that at the time the action was brought, the plaintiff dwelt in two places, in Scotland and in Golden-square, and, perhaps, even if this had been the case, the County Court would have had concurrent jurisdiction, because it could

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not in that case have been suggested on the roll that the defendant did not dwell more than twenty miles from the defendant is unnecessary to decide that question, because we are of opinion that, under the circumstances, the plaintiff did not recover his costs at Golden-square. Each case must depend upon its own circumstances; but where a party has a permanent dwelling, we do not think that he dwells, in the sense of the word, as used in the statute, at a place where he has for a temporary purpose only. The second question upon the true construction of the stat. 13 & 14 Vict. c. 13, and is of much importance, not only on account of its general bearing upon the practice of the court, but because we are unfortunately unable, after much consideration, to concur with the Court of Exchequer in the view they have taken of that section. We are not disposed to depart from the rule of construction of statutes so frequently resorted to by my brother Parke. We consider ourselves bound to adhere to the ordinary meaning of the words used, and to the grammatical construction, unless that is at variance with the intention of the Legislature, to be collected from the statute itself, or to some manifest absurdity or repugnance. The real point upon the meaning of the word "may." Does it necessarily confer upon the courts and the judges a discretion in the three cases mentioned in the 13th section? Or was it used, and, as we think, properly used, to confer upon them an authority in the cases mentioned; or, is it doubtful in which of these two senses the word is used by the Legislature? If the second is the true meaning, we must adhere to the ordinary meaning of the words used, and to the grammatical construction, by holding that the courts and judges have no discretion when either of the three cases exist upon which an authority arises. If it is doubtful in which sense the word is used, we must consider whether it would not lead to manifest absurdity and repugnance to hold that the word "may" conferred upon the courts and the judges a discretion in all cases mentioned in the 13th section. Before the passing of the County Courts Act, this would have had the effect of giving the plaintiff his costs by the statute of Gloucester; and by that act (9 & 10 Vict. c. 95, s. 128), he would have had his costs because the defendant could not have suggested that the plaintiff did not dwell more than twenty miles from the defendant at the time of the action brought. In this state of the law, the 13 & 14 Vict. c. 61, was passed, the 11th, 12th, and 13th sections of which refer to costs. The principal object of the 11th section seems to have been to get rid of the very expensive and unnecessary proceeding by suggestion necessary under the former law. In substance, for the purposes of this case, it enacts, that if, in an action of debt, commenced in the Superior Courts, the plaintiff shall recover a sum not exceeding 20*l.* he shall have judgment to recover such sum only, and no costs, except in the cases therein after provided; and no suggestion shall be necessary to the plaintiff of costs. The cases thereafter provided are

l in the 12th and 13th sections, and are of two kinds—those h may appear at the trial before the judge or other presiding r, and those which may be established by affidavit before the t or a judge at chambers, whether there be a verdict in the n or not. Of the former, two cases are provided for by the section—the one, where it appears to the judge or presiding r at the trial that the cause of action was one for which no t could have been entered in a County Court; the other, e it appears to the judge or presiding officer at the trial that : was a sufficient reason for bringing the action in the rior Court; and in either of these cases, if the judge or pre- g officer certifies to that effect upon the back of the record, laintiff is to have his costs. Of the latter, three cases, and : only, are provided for in the 13th section—where there is rrent jurisdiction, where no plaint could have been entered e County Court, and where the cause has been removed from County Court by *certiorari*; and if either of these cases urs to the satisfaction of the court or a judge at chambers, court or judge may thereupon direct that the plaintiff shall er his costs. Is there to be added to these three cases, ssly mentioned in the section, a fourth inquiry, independent d possibly unconnected with, the specific question before the or judge; viz., an inquiry into the general conduct of the es, for the purpose of ascertaining whether the plaintiff is in e entitled to his costs? No power to institute such an ry is expressly given by the 13th section, whereas the 12th on gives the judge or presiding officer a discretion, and les him to certify that there was a sufficient reason for ing the action in the Superior Courts. The omission from 13th section of an authority expressly given by the 12th, d seem to show that it was not intended to confer upon the t or a judge at chambers a discretion to inquire whether there sufficient reason for bringing the action in a Superior Court. in, it could not be intended that a judge at chambers should a discretion whether the plaintiff should have his costs in a where no plaint could have been entered in the County rt, and that a judge at Nisi Prius should have no such dis- ion in the same case; and yet in the 12th section, in addition he discretion vested thereby in the judge or presiding officer, ress reference is made to the case where no plaint could have n entered in the County Court, which would have been ecessary if in that case also he had a discretion, for then the member of the section giving a general discretion would have duded all cases. To take the instance common to the 12th and h sections, the 11th section may be read thus:—If in any ion of debt the plaintiff shall recover in a Superior Court a n not exceeding 20*l*., he shall have judgment to recover such n only, and no costs, except in the case where no plaint could ve been entered for the cause of action in the County Court; which case, if it appear to a judge at Nisi Prius, he shall certify

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the same upon the back of the record, or if it appear  
faction of a judge at chambers, he may, that is, he has  
to direct that the plaintiff shall have his costs.  
speaking, the word "may" is correctly used to describe  
of authority which a judge has in such cases. He is not  
act against the plaintiff's wish; but the fact being  
which gives the authority, he may, at the plaintiff's request  
the order, and thus the costs are awarded to the plaintiff  
with his assent. The general authorities on the subject  
fully to warrant the construction which we have thought  
called upon to put on the statute. An early case was  
Mr. Badely (*Alderman Blackwell's case*), from 1 Vern.  
also reported in 1 Eq. Cas. Abr. 52, and 2 Ch. Cas. 191.  
the questions there raised before Lord Keeper Mordaunt  
whether a commission of bankrupt could be denied by the  
Chancellor, or whether it was *de jure*. And the Lord  
said (2 Ch. Cas. 191), "I hold that the commission is denied  
the statute which saith that the Chancellor *may* grant  
is as if it had been *shall* grant, or ought to grant.  
cannot grant *ex officio*, but on request of persons interested.  
And he added (1 Vern. 153; 1 Eq. Cas. Abr. 52), "It has  
been so resolved by all the judges." The case has been

by others, the last of them being *Reg. v. The Tithe Commis-  
(19 L. J., N. S. 177, Q. B.)*, which, we think, support  
that where a statute confers an authority to do a judicial  
certain case, it is imperative on those so authorized, to exercise  
the authority when the case arises, and its exercise is due  
for by a party interested, and having the right to make  
application. For these reasons we are of opinion that  
"may" is not used to give a discretion, but to confer  
upon the court and judges, and that the exercise of such  
depends, not upon the discretion of the court and judges, but  
upon the proof of the particular case out of which such  
arises. But if it be doubtful in which sense the word "may"  
used, we should be justified, by the rule of construction  
we have referred, in considering whether absurdity or repugnance  
would not follow from holding that a discretion was given.  
might accordingly modify the word so as to avoid that consequence.  
In our opinion absurdity and repugnance would follow from  
a construction. If the 11th section was intended to prevent  
expense of a suggestion, that object would be effectually  
by giving the judges a discretion under the 13th section, that  
only must every cause be re-tried upon affidavits, but to prevent  
conduct of the parties, and, perhaps, of the witnesses, to be  
examined for the purpose of enabling the judge to satisfy the  
plaintiff should have his costs. The judge at Nisi Prius  
exercise of the discretion expressly given to him by the 13th  
section, must be governed by evidence applicable to the facts  
joined between the parties; but a judge at chambers is not  
subject to no such limitation, and may be led into any

which the parties may think fit to institute, without the means of enforcing the production of evidence. This further consequence would follow from holding that the word "may" conferred discretion. Wherever the plaintiff has a cause of action for which he cannot sue in the County Court, and in respect of which he has not sustained the damage necessary to give costs, his right to costs may depend, not upon his success in the action, but upon the discretion of a judge to be exercised at chambers, and, as it is said, without control, and without the means of compelling adverse witnesses to depose to facts which may be only within their own knowledge. If it were doubtful whether the word "may" was held to give a discretion, or to confer an authority, we should not hesitate to adopt the latter meaning to avoid the consequences which we have pointed out. We are aware that this decision conflicts with two cases which have been decided by the Court of Exchequer, and to which reference has been made. We regret that we are compelled, after full consideration, to arrive at this conclusion. The case of *Latham v. Spedding*, in the Queen's Bench, does not touch the question; for that was decided not upon the words of the statute, but upon the ground that the plea of "not possessed" did not, as was erroneously supposed, put in issue the question of title only. The rule must be absolute. (a)

*Rule absolute.*

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ISAACS v. WYLD.

*Claim above 50l.—When excess should be abandoned.*

*Where a party sues in a County Court in respect of a cause of action for a greater amount than 50l., the abandonment of the excess required by 9 & 10 Vict. c. 95, s. 63, need not appear on the face of the particulars of demand, but may be made at any time before hearing.*

*The judges, however, recommend that it should be made in the plea.*

THIS was a rule for a prohibition to the judge of the County Court of Cornwall. The plaintiff, summons, and particulars of the court below, alleged the plaintiff's cause of action to be in respect of a demand for 50l. for goods sold, not describing the sum as parcel of any other. At the trial, it appeared that the plaintiff's entire claim against the defendant amounted to 98l. for goods supplied at different times, but so as to constitute a demand, and the judge required the plaintiff to abandon the excess above 50l. He accordingly wrote on the particulars a non est in regard to the 50l. sought to be recovered in the action without full satisfaction of the larger sum claimed. This being done the judge gave judgment for the plaintiff for 50l., noticing in his judgment the abandonment of the excess. The present rule was obtained on the ground that the court had no jurisdiction to grant an abandonment having been made too late.

*Kingdon* (November 22) showed cause.—First, supposing the objection in this case to be well founded, it is a matter of procedure and not of jurisdiction, and a prohibition will not lie for a wrong decision on points of practice: (*Ex parte Smyth*, 3 Ad. & E. 1; *Roberts v. Humby*, 3 M. & W. 120; *Jolly v. Baines*, 12 Ad. & Ell. 201; *Mellish v. Richardson*, 1 Cl. & Fin. 224.) And in *Robinson v. Lenaghan* (1 Cox, Macrae, & Herts. 97) this court refused to interfere by prohibition with the decision of a County Court as to proof of the service of a summons in that court. Secondly, the judge was right in the course he adopted. The statute specifies neither the time when, nor the manner in which the required abandonment is to be made; so that, in order to maintain the County Court jurisdiction over the cause, nothing more was necessary than the fact of abandonment. In *Vines v. Ar*

Macrae, & Herts. 320), the plaintiff did not appear, and it, therefore, have abandoned the excess. [PARKE, B. Decision in that case was only that there must be some act in court.] *Kimpton v. Willey* (1 Cox, Macrae, & Herts. 320), shows that it may be done at the trial, or even by judgment in the judgment. *Brunskill v. Powell* (19 L. J. 362, 18 Cox, Macrae, & Herts. 320), also cited.

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ontrà.—The abandonment of the excess is a condition to the court having jurisdiction. That is the true principle. At the very least, it ought to be brought to the notice of the defendant by some formal act before the trial. The judgment is to be in satisfaction of the cause of action in the plaintiff, which is the evident meaning of the words of sect. 63. The whole demand, therefore, should be abandoned, together with an abandonment of the excess.

*Cur. adv. vult.*

#### JUDGMENT.

B.—This was a motion for a prohibition against the County Court of Cornwall, to prohibit him from entering a judgment on a plaintiff for 50*l.* for goods delivered. It appeared from the affidavits, that this was part of a larger sum of 98*l.*, supplied at different times, which would constitute a demand, on the principle laid down in *Grimbley v. Ex. Rep.* 479; 1 Cox, Mac. & Herts. 79), and it was that the judge had no jurisdiction to try a plaintiff for a demand, which this was, unless a disclaimer was entered on the proceedings of the court at the time of the plaintiff. The 63rd section of the 9 & 10 Vict. c. 95, provides that shall not be lawful for any plaintiff to divide any cause for the purpose of bringing two or more suits in any county courts; but any plaintiff having cause of action for more than 20*l.*, for which a plaintiff might be entered under this act, more than 20*l.*, may abandon the excess, and thereupon the plaintiff shall, upon proving his case, recover to an amount not more than 20*l.*, and the judgment of the court upon such plaintiff shall be a full discharge of all demands in respect of such causes and entry of the judgment shall be made accordingly." In the construction of this clause, it has been held in several cases *v. Arnold*, 8 C. B. Rep. 632; 1 Cox, Mac. & Herts. 320; *Brunskill v. Powell*, 19 L. J. 362), in the Exchequer, that the act of suing for a portion of an entire demand is not an abandonment of the excess, but that some act of abandonment is necessary, and it seems that a memorandum of such abandonment ought to be entered on the proceedings of the court; it does not clearly appear, from the wording of the act, nor is it decided where such abandonment must take place. The plaintiff may abandon, and, thereupon, on proving his case,

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recover the amount to the extent to which the County Court has jurisdiction. The most reasonable course undoubtedly is, that the abandonment should be on the face of the summons, or the particulars annexed, so that the defendant may at once acquiesce, if he is so minded, instead of being obliged to be at the trouble and expense of attending the County Court in order to compel the plaintiff to abandon the excess above 50*l.* on the hearing. There is no express provision to this effect in the act of Parliament. The language of the 63rd section, although equivocal, seems rather to intend that the abandonment may be on or before the hearing. In this case there was at the time of the hearing a formal abandonment of 46*l.*, the excess of the entire demand above 50*l.*, and an entry or minute made on the face of the proceedings; and after such abandonment, we cannot say that the judge of the County Court had not jurisdiction to give judgment and to grant execution for 50*l.* We therefore think that the rule should be discharged. It certainly would be as well if the County Court judges should, under the powers of the 12 & 13 Vict. c. 10 s. 12, make a rule to require the disclaimer to be stated on the face of the summons, or particulars of demand annexed.

ALDERSON, B.—That would save a great deal of expense to the defendant, I think.

PARKE, B.—As it was a doubtful question, the rule should be discharged, without costs.

MARTIN, B.—I thought the abandonment of the excess should be inserted in the summons.

*Rule discharged, without costs.*

## COURT OF COMMON PLEAS.

COUNTY COURT APPEAL.

*December 1, 1851.*

MAULE, CRESSWELL, WILLIAMS, and TALFOURD, JJ.)

WEDLAKE AND OTHERS v. SARGENT.

*Sufficiency of summons and particulars.*

*Summons, the defendant was described as "Yeoman" merely, and particulars annexed to the plaint were, "To the sinking of a shaft—to putting up a machine—to cash paid for turf for drying s"—and the cause of action accrued to the plaintiffs, as miners by the captain of a mine in which the defendant was a holder:*

*that the cause of action was sufficiently disclosed in the summons particulars.*

S was an appeal against the decision of the judge of the County Court at East Stonehouse, Devonshire, adjudging the plaintiff to pay 40*l.* 10*s.*, the amount sued for.

The summons the defendant was described as "yeoman," and called upon to answer Wedlake, Dunstone, and others, miners, the particulars of which are hereunto annexed."

The following were the particulars annexed:—

46:

|                                           |       |    |    |
|-------------------------------------------|-------|----|----|
| sinking a shaft at Ivy Tor Mine, South    | £     | s. | d. |
| Dunstone, 3 fathoms ... ..                | 50    | 0  | 0  |
| putting up a machine ... ..               | 1     | 0  | 0  |
| cash paid for turf for drying clothes ... | 0     | 10 | 0  |
|                                           | <hr/> |    |    |
|                                           | 51    | 10 | 0  |
| cash on account ... ..                    | 11    | 0  | 0  |
|                                           | <hr/> |    |    |
|                                           | £40   | 10 | 0  |

At the hearing of the summons on the 2nd September, 1851, the defendant pleaded—1. The general issue; 2. Payment; 3. A discharge of all causes of action by Dunstone, one of the plaintiffs. The defendant objected that the summons and particulars were insufficient to explain what was the ground of action. The judge held the objection was too late after pleading.

Y Y

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AND OTHERS  
v.  
SARGENT.

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*Sufficiency of  
particulars.*

At the close of the plaintiff's case the defendant produced release under seal, and proved its execution by Dunstone on morning of the day of the trial of the plaintiff. In cross-examination the witness, who proved its execution, said he was the clerk of the defendant's attorneys; that he went to Menheniot to call for Dunstone, who told him he was no party to the action; that he explained the purpose of the deed to him. The bond was put out in the case, and appeared to have been executed by a marksman, and did not show any consideration for it. The judge reserved his judgment, and on the 15th September, gave judgment for the plaintiffs for the full amount, remarking that the release was evidently a trick.

The questions for this court were:

1. Whether the summons and particulars sufficiently disclosed a ground of action against the defendant, and, if not, whether the objection ought not to have been allowed on demurrer.

2. Whether the judge was bound to give effect to the release, or whether it was open to him, upon a consideration of all the circumstances of the case, and a general view of all the evidence, to consider it, as he did, fraudulent, and to give no effect to it.

*Collier*, for the appellant (the defendant below).—The names of the parties, and the substance of the action, are to be stated in the summons and plaint: (9 & 10 Vict. c. 95, s. 39.) Here it is stated that the shaft was dug for the defendant, or at his request, or upon his authority, or in what way he was liable to the demand. The defendant is merely described as a yeoman, not as a shareholder or adventurer in the mine, or a director. [MAULE, J.—Can you say more than that the cause of action is stated in a loose manner? This is something like a special demurrer in the County Court after verdict. The statement will do.] 2. As to the release. It is admitted that, if there was any evidence at all of fraud, there was a ground of appeal; but it is submitted that there was no evidence at all of fraud.

*E. W. Cox*, for the respondents (the plaintiffs below).—The real question intended for the opinion of the court is whether, assuming the judge to be satisfied of the fact of fraud, he was right to treat the release as void and of no effect. That is now disputed, and the point that has been argued is, that the judge was not justified in coming to the conclusion upon the evidence that the release was procured by a fraud. It is clear that, if there was any fact which was evidence of the fraud, the judge was the proper person to decide upon it, and this court will not interfere with his decision. The bond was made by a marksman, and consideration was given, and from those, and the other circumstances of the case, the judge came to the conclusion that the release was a trick and a fraud.

MAULE, J.—Here the releasing plaintiff and the others had a good cause of action against the defendant. Then the releasing plaintiff is sought out by the clerk of the defendant's attorney

ning of the trial. The clerk states that he explained the him, but not that he said anything about his cause of

Now, when the defendant's attorneys sent their clerk to who had a good cause of action, with a release ready drawn, consideration appears to have been given, I cannot say that nothing from which to infer a fraud.

LIAMS, J.—There is a total absence of explanation how the me to go to Dunstone to get the release; and it is more ie absence of the evidence which might fairly have been d, if the release had been *bonâ fide*, than from the evidence s actually given, that I think that there was some ground judge presuming that it was a fraud.

FOURD, J.—I do not wish to be understood as saying more at there was some evidence of fraud in this case.

*Judgment for the respondents.*

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AND OTHERS  
v.  
SARGENT.  
—  
1851.

*Sufficiency of  
particulars.*

## COURT OF QUEEN'S BENCH.

### COUNTY COURT APPEAL.

*June 19, 1851.*

(Before PATTESON and WIGHTMAN, JJ.)

JONAS, appellant, v. ADAMS, respondent.

#### *Evidence—Appeal—New trial.*

*nt for breach of covenant was tried by a jury, and a verdict found the plaintiff. The defendant appealed, on the ground that the e had improperly received certain evidence. The court was of ion that the evidence had been improperly received, and the dant applied that judgment might be entered for him: hat, under 13 & 14 Vict. c. 61, s. 14, the court had no power to side the verdict of the jury, and to direct judgment to be entered the defendant, and that it could do no more than direct a new*

[S was an appeal from the County Court of Plymouth. The action was for breach of covenant. The cause was tried by a who gave a verdict for the plaintiff. The ground of appeal at evidence of a conversation, which took place at the time ating the deed containing the covenant sued upon, had been erly received.



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v.  
ADAMS.  
—  
1851.  
—  
*Evidence—  
Appeal—New  
trial.*

*Collier* appeared for the appellant (the defendant below), court called on—

*Greenwood*, Q. C., for the respondent (the plaintiff below) contended that the evidence was admissible; for, altho' it would have been inadmissible for the purpose of varying the verdict yet it might be received as bearing upon the breach of contract. [PATTESON, J.—It is quite clear, from the case, that the jury gave their verdict entirely on the supposed parole agreement attempted to be introduced by the evidence of the conversational rule of law is more clear than that evidence of conversation previous to an agreement being reduced into writing is admissible to vary the written contract. The evidence in this case; improperly received.]

*Collier* applied to the court to order judgment to be entered for the defendant, under s. 14 of 13 & 14 Vict. c. 61, which allows appeal. The court of appeal "may either order a new trial on such terms as it thinks fit, or may order judgment to be entered for either party, as the case may be, and may make such order with respect to the costs of the said appeal, as such court may think proper."

PATTESON, J.—It seems to me that, under this section, the court has no power to set aside the verdict, and direct a judgment to be entered for the defendant. We can only grant a new trial on discretionary power, contained in the last sentence, applicable to the costs of the appeal.

WIGHTMAN, J.—Had the case been a decision by the County Court alone, without the intervention of an appeal, the court might have directed judgment to be entered for the defendant. When there is a verdict of a jury, we can do no more than order a new trial.

*Appeal allowed ; new trial granted.*

## COURT OF QUEEN'S BENCH.

COUNTY COURT APPEAL.

*Trinity Term, 1851.*

(Before PATTESON and WIGHTMAN, JJ.)

*June 19, and November 26, 1851.*

BRIDGES v. HAWKSWORTH. (a)

*Recover—Property in lost goods—Finder—Place of finding.**Finder of lost goods has a good title to them against all the world, the true owner; and that right is not affected by the circumstance they were found inside the shop of another person, and handed over for the mere purpose of delivering them to the true owner, if he appear.*

It was an appeal from the Westminster County Court. The action was brought by the plaintiff to recover from the defendant the value of several bank notes, which he had found on the premises of the defendant's shop.

The facts were, that in October, 1847, the plaintiff went into the defendant's shop on business, and, as he was leaving, picked up on a floor a parcel containing bank notes to the amount of 65*l.* He immediately showed it to the shopman; and thereupon the defendant was called into the shop, and requested by the plaintiff to deliver the notes, until the owner appeared to claim them. The defendant did so, and advertised the notes in the newspapers; but no one came to claim them. Three years having elapsed, and no one appearing, the plaintiff applied to the defendant to return the notes, offering to pay the expenses of advertising, and to satisfy the defendant in case the real owner should afterwards appear.

But the defendant refused to do so, and, consequently, the action was brought. The judge decided in favour of the plaintiff; but it was found, as a fact in the case, that the plaintiff, when he handed the notes over to the defendant, did not intend to divest himself of any title which he might have to them.

*June 19.*

(with him *Heath*), for the appellant.  
, contra.

*Cur. adv. vult.*

PATTESON, J., now delivered the judgment of the court.—

This case, relating only to general law, and not to that of the County Courts, is much  
l.

BRIDGES

v.

HAWKES-  
WORTH.

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Trouver for  
goods found—  
Property—  
Place of  
finding.

The notes which are the subject of this action were dropped mere accident in the shop of the defendant, by the owner. The facts do not warrant the supposition that they had been deposited there intentionally, nor has the case been put at all on that ground. The plaintiff found them on the floor, they being festly lost by some one. The general right of the finder of an article which has been lost, as against all the world except the owner, was established in the case of *Armoury v. Delamirie* (504), which has never been disputed. This right would clearly have accrued to the plaintiff had the notes been picked up by him in the shop of the defendant; and if he once had the right, then it is clear that he did not intend, by delivering the notes to the defendant, to waive the title (if any) which he had to them, but to hand them over to the defendant merely for the purpose of delivering them to the owner, should he appear. Nothing that was done by the defendant has altered the state of things; the advertisements inserted in newspapers referring to the defendant had the same effect as if the plaintiff had tendered the expense of these advertisements to the defendant, and offered him an indemnity against any claim made by the real owner, and has demanded the notes. The court therefore, resolves itself into the single point on which the learned judge decided it, namely, whether the circumstance of the notes being found in the defendant's shop gives him the right to have them, as against the plaintiff. There is no authority in our law to be found directly on this point. Perhaps the nearest case is that of *Merry v. Green* (7 M. & W. 125), but it differs in many respects from the present. We were in the course of the argument, to the learned work of Von Parson's, edited by Chief Justice Perry; but even this work, full of subtle distinctions and nice reasonings, does not afford any aid to the present question. It was well asked on the argument, whether the defendant has the right, when did it accrue to him? It must have been antecedent to the finding by the plaintiff. If the finding could not give the defendant any right. If the plaintiff had been accidentally kicked out of the shop, and there found one passing by, could it be contended that the defendant had a right to them from the mere fact of their being originally found in his shop? If the discovery had never been communicated to the defendant, could the real owner have had any cause of action against him because they were found in his house? Certainly not. The notes never were in the custody of the defendant, nor under the protection of his house, before they were found, as they have been had they been intentionally deposited there by the defendant. The defendant has come under no responsibility, except from the communication made to him by the plaintiff, the finder, and the advertisement taken by way of advertisement. These steps were really taken by the defendant as the agent of the plaintiff, and he has been bound to give an indemnity, the sufficiency of which is not disputed. Therefore, no circumstances in this case to take it out of the general rule of law that the finder of a lost article is entitled to it.

inst all persons, except the real owner; and we think that  
 ile must prevail, and that the learned judge was mistaken in  
 g that the place in which they were found makes any legal  
 nce. Our judgment, therefore, is, that the plaintiff is entitled  
 e notes as against the defendant; that the judgment of the  
 below must be reversed, and judgment given for the plaintiff  
 l; plaintiff to have the costs of appeal.

*Judgment reversed, with costs.*

BRIDGES  
 v.  
 HAWKS-  
 WORTH.  
 ———  
 1851.  
 ———

## BAIL COURT.

*Trinity Term, 1851.*

(Before WIGHTMAN, J.)

JONES AND WIFE v. CURREY AND WIFE.

*Prohibition—Jurisdiction—Malicious prosecution.*

*nons stated the cause of action in the following terms:—"For that  
 wife assaulted the wife of the plaintiff, on, &c., and maliciously  
 d her to be wrongfully charged with stealing, &c., and to be con-  
 l through the streets, and to be locked up and detained in custody,  
 whereby the plaintiff was put to expenses in producing witnesses  
 other persons in clearing the plaintiff's said wife from the said  
 rious assault and charge," &c. Particulars were annexed in terms  
 ar to the summons, claiming for damages a sum of 10l.  
 hat this was an action for a malicious prosecution, and, by sect. 50  
 e County Courts Act, the County Court had no jurisdiction to en-  
 in it.*

*is case, a rule had been obtained calling upon the plaintiffs  
 show cause why a writ of prohibition should not issue to  
 l proceedings in the action.*

*laint had been entered in the Southwark County Court of  
 , and the summons stated the cause of action as follows:—  
 that your wife assaulted the wife of the plaintiff on the 25th  
 ch, 1851, and maliciously caused the plaintiff's wife to be  
 fully charged with stealing a shawl, and conveyed from her  
 through the streets to the station, and caused her to be locked  
 detained in custody at and in the police cell, in the borough  
 thwark, from eight o'clock at night of the said 25th of March  
 sitting of the police court of the 26th; and, further, caused  
 intiff Mary Anne Jones, and another surety, to be bound in*

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—  
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recognizances for the due appearance of the wife of the said plaintiff at the said police court on Tuesday, the 15th day of April, 1851, to await any indictment which might be found against the wife of the plaintiff; whereby the plaintiff was put to expense in producing witnesses and other persons on clearing the plaintiff's said wife from the said malicious assault and charge, to the plaintiff's damage," &c.

The particulars of demand contained a similar statement, and claimed 10*l.* 15*s.* 2*d.* damages.

It appeared from the affidavits on which the motion was made that, upon the hearing of the plaint, it was objected on the part of the defendants that the judge had no jurisdiction to try the case upon the ground that this was an action for a malicious prosecution, and, consequently, within the proviso of the 58th section of the 9 & 10 Vict. c. 95. The judge, however, decided that he had jurisdiction, and proceeded to hear and determine the plaint, giving judgment for the plaintiffs for the amount of damages sought to be recovered. It also appeared that the giving into custody of the plaintiff Mary Anne Jones, by the defendant Cecilia Currey, was the only assault proved and found by the judge to have been committed, nor was the judgment given for any other assault.

*T. Jones* now showed cause.—The only question was, whether the judge, in the matter before him, proceeded as on a plaint for malicious prosecution. The terms of this plaint would constitute a good declaration in trespass. It was stated that the wife of the party assaulted the wife of the other; and the words "caused her to be conveyed from her house through the street to the station, and caused her to be locked up and detained in custody at and in the police cell," were the ordinary terms of a declaration in trespass for false imprisonment. The judge had clearly jurisdiction over the assault, and a prohibition will not go where the judge has jurisdiction over any part of the complaint, but only where his jurisdiction is entirely excluded.

*Massy Dawson*, in support of the rule.—We show that the assault proved was the giving into custody; that is not disputed. The judge, therefore, adjudicated upon all the other circumstances involved in and surrounding that act. To give the County Courts jurisdiction, there must be an actual assault, and not, as in this case, a merely constructive one, by giving a person into custody. The plaint might be taken to be either in trespass or case; but this was attributable to the method of pleading adopted in these inferior courts, and was an instance of the confusion created by departing from old and well-established rules. Again, by the practice of the County Courts, a plaintiff is restricted to his particulars of demand, and, looking at the particulars in this case, it clearly appeared that the act for which damages were claimed was the maliciously causing the wife of the plaintiff to be wrongfully charged with stealing. It can only be gathered from the summons and particulars taken together that the action was one for a malicious prosecution; and, in the absence of any express rule to guide the court in its construc-

n of those documents, the old rule would be adopted, and the findings would be construed most strongly against the party suing.

WIGHTMAN, J.—The only question in this case is, whether a suit in a County Court is wholly or in part a plaint for a malicious prosecution. The summons states that the wife of the defendant assaulted the wife of the plaintiff, and maliciously caused her to be charged with stealing a shawl, &c., whereby the plaintiff was put to expenses in clearing the plaintiff's wife from the said malicious assault and charge. Now, it is contended that the words "the defendant assaulted the wife of the plaintiff" may be taken to mean something more than a constructive assault, and that, under that charge of assault, the County Court Judge, without exceeding his jurisdiction, might have inquired into all the circumstances, although it may seem to constitute a malicious prosecution, and that he might give damages for those circumstances under the simple charge of assault. There is no ground, however, upon which such an argument can be supported. The charge of assault *simpliciter* seems to be an introduction to what follows. The particulars of the assault and are also brought before me, and there again the words of the summons are repeated, and then one sum of 10*l.* 15*s.* 2*d.* is claimed for all the damages sustained by the assault and malicious charge; and it appears, that was within a trifle the amount the judge awarded. The plaintiffs do not claim so much for the assault, and so much for the circumstances attending the assault, but put it altogether for one sum. The objection was taken before judgment was given: the judge, however, proceeded to hear and determine the plaint. Another assault was before the judge but that which was a constructive assault, viz., "the giving into custody." The plaintiffs do not deny, by an affidavit, that this was a case of malicious prosecution; but, upon the whole case, as represented to the court by the affidavit of the defendants, and upon looking at the summons and particulars of demand, it does sufficiently appear that it was a case of malicious prosecution. A prohibition will, therefore, be granted, on the ground that this is one of the cases excepted from the jurisdiction of the County Courts by the 58th section of the statute.

*Rule absolute.*

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WIFE  
v.  
CURRY AND  
WIFE.  
—  
1851.

*Jurisdiction—  
Malicious  
prosecution.*

## EXCHEQUER CHAMBER.

July 20, 1851.

## LAVEY v. THE QUEEN.

*Perjury in a County Court—Form of indictment.*

*An indictment for perjury averred that "on, &c., in the Whitechapel County Court of Middlesex, holden at the Court-house in Osborne-street, Whitechapel, in the parish of, &c., in the County of Middlesex, before J. M., serjeant-at-law, then and there being judge of the said court, a certain action on contract, then pending in the said County Court, between A. L., suing as widow and executrix of H. L., plaintiff, and R. H., defendant, came on to be tried, and was then, in due form of law, tried and heard before the said J. M., &c.; upon which the said A. L., &c., tendered herself as a witness on her own behalf, and was duly sworn, &c., before the said J. M., then and there being judge of the said court as aforesaid, and then and there he administered sufficient and competent authority to administer the said oath to her," &c.:*

*Held, upon writ of error, first, that the court was sufficiently designated as a court held under stat. 9 & 10 Vict. c. 95; and, secondly, that although there was no express averment that the oath was administered in a judicial proceeding over which the court had jurisdiction, the averment was, by necessary intendment, involved in the allegation that the judge had sufficient authority to administer the said oath.*

**E**RROR from the Court of Queen's Bench, upon a judgment of imprisonment, passed by Lord Campbell at Nisi Prius, upon the following indictment, which had been removed by certiorari from the "Central Criminal Court," } The jurors for our Lady the Queen to wit. } upon their oath present, that herebefore and at the time of the committing of the offence hereinbefore mentioned, to wit, on the ninth day of April, in the year of our Lord, 1850, in the Whitechapel County Court of Middlesex, holden at the Court-house in Osborne-street, Whitechapel, in the parish of St. Mary, Whitechapel, in the county of Middlesex, and within the jurisdiction of the said Central Criminal Court, before James Manning, Serjeant-at-Law, there and then being the judge of the said court, a certain action on contract, then pending in the said County Court between Ann Lavey, suing as widow and executrix of the last will and testament of Hyam Lavey, deceased, plaintiff, and Robert Hannah, defendant, came on to be tried, and was then and there, in due form of law, heard and tried by and before the said James Manning, then and there being judge of the

y Court as aforesaid; upon which said hearing and trial in Lavey, of the parish of St. Paul, Shadwell, in the Middlesex, and within the jurisdiction of the said Central Court, widow, appeared and tendered herself as a witness in behalf, and was then and there, within the jurisdiction of the said Central Criminal Court, duly sworn, and took her oath before the said James Manning, then and there being judge of the said court as aforesaid, and then and there having and competent authority to administer the said oath to the said Ann Lavey, in that behalf, that the evidence which the said Ann Lavey, should give to the court then and there in the matter then and there in question between her, the said Ann Lavey, and the said Robert Hannah, should be the whole truth, and nothing but the truth. And the jurors upon their oath aforesaid, do further present, that at and during the hearing and trial of the said action as aforesaid, it then became and was a material question in the said action, whether the said Ann Lavey, had ever been tried at the said Central Criminal Court for any offence whatever, and whether the said Ann Lavey had ever been in custody at the Thames Police Station, in the said county of Middlesex, charged with any offence whatever. And the jurors aforesaid, upon their oaths do further present that the said Ann Lavey, being so charged as aforesaid, and not having the fear of God before her, regarding the laws of this realm, but being moved and seduced by the instigation of the devil, and contriving and intending to pervert the due course of law and justice, and unjustly to oppress and defraud the said Robert Hannah, and to subject him to the payment of divers large sums of money, and sundry costs, charges, and expenses, then and there, and within the jurisdiction of the said Central Criminal Court, on the said hearing and trial of the said action, on her oath aforesaid, falsely, corruptly, knowingly, wilfully, and maliciously, before the said James Manning, then and there being judge of the said County Court as aforesaid, did swear, and amongst other things in substance and to the following—that is to say, that she, the said Ann Lavey, had been tried at the said Central Criminal Court, on an indictment for having feloniously uttered a forged indorsement to a bill of exchange, well knowing it to have been forged, with intent to defraud one Adolphus Brandt and another; and that the said Ann Lavey had never been tried at the said Central Criminal Court for any offence whatever; and that she, the said Ann Lavey, had never been in custody at the Thames Police Station, in the said county of Middlesex, charged with any offence whatever the said forged indorsement as aforesaid; and that the said Ann Lavey had never been in custody at the said Thames Police Station, charged with any offence whatever. Whereas, in fact, the said Ann Lavey was, to wit, at a session of the said Central Criminal Court, held on the 21st day of August, in the

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year of our Lord 1843, tried in due form of law for a offence on an indictment for having feloniously uttered and indorsement to a certain bill of exchange, well knowing it been forged, with intent to defraud one Adolphus Bra another; and whereas also, in truth and in fact, the said Lavey was, to wit, on the 21st day of August, in the year Lord 1843, in custody at the Thames Police Station charged with a certain offence, to wit, with having obtained means of a forged note, the sum of one pound five shilling intent to defraud Thomas Yates; and so the jurors aforesaid their oaths aforesaid, do say that the said Ann Lavey, on 9th day of April, in the year of our Lord 1850, at the White County Court of Middlesex aforesaid, at the parish aforesaid within the jurisdiction of the said Central Criminal Court, be said James Manning, then and there being such judge of County Court as aforesaid, and having such power and as as aforesaid, by her own act and consent, and of her own wicked and corrupt mind, in manner and form aforesaid, wickedly, wilfully, and corruptly did commit wilful and perjury, to the great displeasure," &c.

The following points were stated for argument:—

1. That it does not appear from the indictment that there was such a court as the supposed court therein described Whitechapel County Court of Middlesex, or that the court was ever lawfully created or established under statute Vict. c. 95, or ever lawfully existed; nor does it appear from the indictment whether that court was a Court of Record or not, or that the same court had any jurisdiction to hold or try the action on contract mentioned in the indictment.

2. That it does not appear from the said indictment that the cause of action for which the action on contract in the said indictment mentioned was commenced in the said Whitechapel County Court of Middlesex, arose or accrued within the jurisdiction of that court, or was a cause of action over or in respect of which that court had jurisdiction, or that the sum sought to be recovered by the said action did not exceed 20*l.*, or was of such an amount as to be recoverable in that court. And it is in the said indictment alleged that Ann Lavey sued in the said action as widow and executrix of the last will and testament of Hyam Lavey, deceased, whereas the said Ann Lavey could not by law maintain an action on contract in the capacity of or as such widow and executrix.

3. That it appears from the indictment that some issue of matter of fact in the said action came on to be tried by and before James Manning in the said indictment mentioned, and that the said Ann Lavey tendered herself as a witness on her own behalf, but it does not appear from the said indictment that the said James Manning had any power or authority to try such an issue of matter of fact, or that the said Ann Lavey could lawfully

examined as a witness on her own behalf in a cause in which she was the plaintiff.

It is though the indictment states that Ann Lavey was duly sworn and took her corporal oath before the said James Manning as evidence which she should give should be such as in the indictment in that behalf mentioned, yet the said indictment states that the said Ann Lavey took her corporal oath or sworn upon the Holy Gospel of God, or in any other

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at it does not sufficiently appear from the indictment the evidence to which the said Ann Lavey was sworn, as the indictment mentioned, was to be given by her in the said County Court of Middlesex or in the Central Criminal Court in the said indictment mentioned, nor does the said indictment sufficiently show of which of those two courts James Manning, in the said indictment mentioned, was the judge.

It is the indictment alleges that Ann Lavey was sworn and took her corporal oath as therein mentioned with respect to the evidence which she should give to the court therein in that behalf mentioned; but the evidence upon which the perjury is assigned in the indictment alleged to have been given before James Manning, and the indictment does not allege James Manning to be the court to which was to be given the evidence with respect to which Ann Lavey was sworn, as in the said indictment mentioned; and it does not sufficiently appear from the said indictment which of the two courts therein mentioned Ann Lavey was sworn to give evidence with respect to which she was sworn, as in the said indictment mentioned.

It is the indictment does not sufficiently allege or show the nature of the evidence upon which the perjury is assigned with reference to the question or matter to be tried, or that it is material with reference to the question or matter to be tried; and the averments and statements introduced into and contained in the said indictment, for the purpose of showing the materiality of the evidence upon which the perjury is assigned, are not sufficient for that purpose; and that it is consistent with the said indictment that the evidence upon which the perjury is therein assigned was immaterial, and was evidence upon which perjury could not be assigned. That the indictment contains the following averment, that is to say: "And the jurors aforesaid, upon their oath, do further present, that upon the hearing and trial of the said action as aforesaid, it then and there became and was a question in the said action." And such allegation is immediately followed by a statement of divers matters; and it does not appear from the said indictment to which of those matters that the perjury applies or relates.

It is the indictment ought to have concluded *contra formam*

of the plaintiff in error.

*argast, contra.*

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The following authorities cited: *R. v. Ewington* (1 Car. & M. 319); *R. v. Overton* (4 Q. B.); *Ryalls v. The Queen* (18 L. J. Q. M. C.; 3 Inst. 166; 3 Salk. 270.)

*Car. adv. vel.*

#### JUDGMENT.

PARKE, B.—In this case I have now to deliver the judgment of the court. It was an indictment for perjury committed in the County Court, and the averment is, “that in the Whitechapel County Court of Middlesex, holden at the Court-house in Osborne street, Whitechapel, in the parish of St. Mary, Whitechapel, in the county of Middlesex, and within the jurisdiction of the said Central Criminal Court, before James Manning, Serjeant-at-Law, then and there being the judge of the said court, a certain action on contract then pending in the said County Court between Ann Lavey, as widow and executrix of the last will and testament of Hy Lavey, deceased, plaintiff, and Robert Hannah, defendant, came to be tried, and was then and there in due form of law heard and tried by and before the said James Manning, then and there being judge of the said County Court as aforesaid, upon which hearing and trial the said Ann Lavey, of the parish of St. Paul Shadwell, in the county of Middlesex, and within the jurisdiction of the said Central Criminal Court, widow, appeared and tendered herself as a witness on her own behalf, and was then and there within the jurisdiction of the said Central Criminal Court sworn, and took her corporal oath before the said James Manning, then and there being judge of the said court as aforesaid, and then and there having sufficient and competent authority to administer the oath to her, the said Ann Lavey, in that behalf, that the evidence which she, the said Ann Lavey, should give to the court then and there touching the matter then and there in question between the said Ann Lavey, and the said Robert Hannah, should be the truth, the whole truth, and nothing but the truth.” Then they set out the evidence, and aver that the question was material, and that what she swore in answer thereto was false. She pleaded not guilty, and sentence was passed at Nisi Prius of twelve months’ imprisonment, on which she has brought a writ of error. Two objections were stated to this indictment. The first was, that the court in which the proceedings took place, in the course of which the perjury was committed, was not properly described. We intimate our opinion in the course of the argument that that objection cannot prevail. We think it does sufficiently appear that the court was held in pursuance of the 9 & 10 Vict. c. 94, as it is alleged to have been a County Court, and held before a single judge. The second objection was, that there was no averment that the action of contract stated in the indictment was one over which the County Court had jurisdiction; and further, that no intendment can be made in favour of an inferior court that the action pending in it was one over which the court had jurisdiction. If it had not, then perjury could not have been committed in giving evidence in

2. For the Crown it was contended that the court might have authority to put the question, and have it answered, although it had no jurisdiction over the case; but that, even assuming that it was necessary that the suit should be one for a cause of action triable in a County Court, in order to render the witness liable to a writ of habeas corpus, there was a sufficient averment that such a suit involved in the averment that the judge had not and competent authority to administer the said oath, for that he had no such authority (on the supposition that it was necessary that he should have jurisdiction over the suit, in order to render the oath binding), unless that very oath was administered in the course of such a suit; and that the meaning of the averment was that the authority to administer the oath was that it was administered by a person in such a proceeding as to make that oath valid and binding.

For the plaintiff in error, Mr. Willes argued that it was sufficient to make that averment, but that the statute 23 Geo. 2, required something more; and that, in setting forth the substance of the offence, it was not enough to set out the substance of the matter sworn to, and to aver that it was false, and the authority of the judge to administer the oath, and to show expressly, or by implication, that the matter deposed to was material; but that it was shown by an independent averment that the oath was administered in a judicial proceeding of which the court had cognizance, including in that term all proceedings in which wilful perjury is committed by a false oath, because there were several proceedings which are meant to be comprised under that description of inquiries from the Crown, and others; and for the judgment of the Court of Queen's Bench delivered by Lord Denman, 4 Q. B. 83 (*Reg. v. Overton*), was cited. If it were necessary for us to say how we should decide the present case, if it was distinguishable from that, we should require further confirmation: but in this case it is expressly averred that an action was brought in that court, presided over by the judge who administered the oath, and that such action was one of contract, a

and of action of which the court may have cognizance; that the defendant was on to be tried before him; that the plaintiff in error was sworn as a witness upon the hearing, and sworn by the judge; and that it follows the averment of a competence of authority in that the judge administered the oath. It appears, therefore, on the present case, that the oath was administered in the course of a judicial proceeding, whereas, in the case of *Reg. v. Overton*, the court contended that there was no averment that the oath was administered in the course of any judicial proceeding; there the alleged defect was that although it was administered in a judicial proceeding, it did not appear expressly that it was one over which the judge had cognizance. We think it does so appear by necessary implication, for unless he had, he could not have had authority to administer the said oath so as to be valid and binding, and that is the true meaning of it. We therefore think that in this case the alleged defect in the averment of the substance of the

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charge is supplied by necessary implication, by the averment of the competency of authority in the judge to administer the law, and we must infer that it was proved at the trial that the judge had lawful jurisdiction over the proceedings, and there was no averment in the indictment that the matter deposed to was illegal; therefore, the judgment must be affirmed.

*Judgment affirmed.*

## COURT OF EXCHEQUER.

*Michaelmas Term, 1851.*

REES v. WILLIAMS.

*Certiorari—Practice.*

*To prevent the removal of a plaint from the County Court by certiorari on the ground of want of jurisdiction in the Superior Court to maintain the action if removed, the plaint ought to be so framed as to disclose a cause of action over which the Superior Court has jurisdiction.*

*Where a plaint was removed from the County Court by certiorari on the affidavit of the defendant's attorney that difficult questions of law would arise, the court refused to quash the certiorari, tho' the affidavit of the plaintiff's attorney averred that no such questions of law would arise.*

IN this case a plaint had been entered in the County Court of Merionethshire, at Dolgelley, for "50*l.*, money had and received by the defendant for the use of the plaintiff, for the lease of a mine, and on an account stated."

The plaint was removed into this court by *certiorari*, on the application of the defendant. The ground of the removal was, that difficult questions of law would arise on the construction of a certain agreement, and as to the admissibility of the evidence.

Morgan Lloyd now moved, on behalf of the plaintiff, to set aside the *certiorari* on an affidavit made by the plaintiff's attorney at which stated that the sum sought to be recovered was an unliquidated balance of a partnership account, the plaint

t having been carrying on the mine as partners, and which verred that no difficult questions of law would arise at

There are two grounds for this motion; first, the plaintiff's cause of action over which the Superior Courts of Common law have no jurisdiction, and as this court cannot do justice after removal of the plaintiff, the *certiorari* must be quashed; and, second, as the affidavit of the plaintiff's attorney denies that any questions of law will arise, the ground on which the *certiorari* was granted has failed.

MR. B.—If the plaintiff had been really for the unliquidated demand of a partnership account, this court would have quashed the *certiorari*. But the plaintiff discloses a mere liquidated demand, and therefore, is within the jurisdiction of this court. If the demand be really an unliquidated partnership demand, the plaintiff should abandon the present plaintiff and enter a fresh one in the Superior Court, describing it as an unliquidated balance of a partnership account, and such a plaintiff could not be removed.

MR. B.—If the plaintiff enters a fresh plaintiff, describing the demand as an unliquidated partnership claim, a *certiorari* will be granted. I am not so sure, however, that a court of equity will grant it.

MR. B., concurred.

MR. C. B., concurred, and added, "As to the other point, the court will not try on affidavits, whether difficult points of law arise at the trial. The defendant's attorney has sworn that it will be the case, and that is a sufficient ground of removal."

*Rule refused.*

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## BAIL COURT.

*Michaelmas Term, 1851.*

(Before Mr. JUSTICE WIGHTMAN.)

HESLOP v. McGEORGE.

*Mandamus—Interpleader summons—Notice of particulars of Goods having been seized under an execution out of a County third party claimed them under an assignment, whereupon he took out an interpleader summons. The claimant in due time a particular of the goods he claimed, stating (without specifying individually) that he claimed all the goods possessed by the defendant and setting forth his title. On the hearing it was objected that the notice was bad, in not specifying the goods or including them item by item by schedule, which objection the judge held to be good, and refused the case. Upon a motion for a mandamus to compel him to comply, Held, that the particulars of claim were sufficient, and the mandamus granted accordingly.*

THIS was a rule calling upon the judge of the County of Durham, holden at Darlington, to show cause why a mandamus should not issue, commanding him to proceed to determine an interpleader summons.

The facts of the case were these: a plaint had been entered in the Durham County Court, at Barnard Castle, by one Helmar, the defendant, upon which judgment was given for the plaintiff, whereupon, on the 16th of April last, execution was levied upon certain goods in the possession of the defendant. To the present plaintiff (Heslop) claimed to be entitled; upon the bailiff who seized took out an interpleader summons.

In obedience of the rule upon the subject, which directs that the claimant shall, five clear days before the day on which the summons is returnable, deliver to the officer, &c. "a particular of all the goods and chattels alleged to be the property of the claimant, and the ground of his claim," he gave the following notice of particulars.

"Take notice, that by indenture bearing date the 5th of February, 1851, made between James Henderson McGeorge of Darlington, in the county of Durham, innkeeper, of the one part, and me, the undersigned Robert Heslop, of Darlington, at present a spirit merchant, of the other part, all the household goods, furniture, plate, linen, and china, carts, carriages, horses, casks, and personal estate and effects whatsoever, of him the said Henderson McGeorge, then or at any time thereafter due

uance of the said indenture, in or about his houses, brewery, premises at Darlington aforesaid, and at Ferryhill, in the said 7 of Durham or elsewhere; and all the estate and interest said James Henderson McGeorge therein, were assigned conveyed unto me, the said Robert Heslop, my executors, administrators and assigns, upon trust, on demand by sale of the said assets to raise the sum of 348*l.* 7*s.* 10*d.* then due and owing to the said Robert Heslop, from the said James Henderson McGeorge, as in the said indenture is mentioned, and the interest to be due for the same; and further take notice, that such demand has been made, but that the said sum of 348*l.* 7*s.* 10*d.* and interest thereon, still remains due to me and unpaid; and that claim to all and singular the household goods and other effects lying in the dwelling-houses, and brewery, and premises in occupation of the said James Henderson McGeorge at Darlington and Ferryhill aforesaid.—Dated this 16th day of April, 1851.

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George Taylor, Esq., high bailiff of the County Court of Durham, at Darlington, and Mr. Oliver, bailiff of the said court at Darlington."

When the interpleader summons came on for hearing, it was objected on the part of the execution creditor, that the foregoing notice of particulars was not sufficient, inasmuch as the particulars ought to have been set forth in an inventory. After hearing objection argued, the judge held the notice of particulars to be insufficient, and refused to hear the case.

The defendant now showed cause.—The question is simply as to the sufficiency of the notice; and it is submitted that this notice is not sufficient for the reason assigned at the hearing before the County Court judge. The deed purports to assign, not only all the goods which the defendant possessed at the time of its execution, but also future-acquired goods, and as to these latter the assignment will be inoperative: it was, therefore, necessary to name the goods specifically, to see if any, or what of them, were those which had been passed by the assignment.

THE JUDGE.—The judge, no doubt, might have directed better particulars to have been given, if he thought those delivered were sufficiently specific, but here he has refused to hear. He says the notice is insufficient because there is no schedule of the goods.

THE PLAINTIFF.—As there were after-acquired goods taken, it was objected that the articles should be specified, that the bailiff might know what to seize.

THE JUDGE.—That would be a matter of proof upon the facts. At present the party claims the whole goods. It might be proved, upon investigation, it might turn out that the deed did include all the goods seized, but that is a matter for proof. Every reason for an interpleader summons is, that the bailiff does not tell whose goods they are that he has seized.



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*Lush.*—The case of *Reg. v. Richards*, 20 L. J. 351, Q. B. (see also *Reg. v. The County Court Judge of Owestry*, ante, 492), is precisely in point.

*Atkinson.*—After that case, I find it difficult to resist this rule *Lush*, in support of the rule, was not called upon.

*Rule absolute.*

## BAIL COURT.

*Michaelmas Term, 1851.*

(Before Mr. JUSTICE WIGHTMAN.)

*Ex parte* THE OVERSEERS OF CHRISTCHURCH.

*Mandamus—Execution for costs in the County Court—Practice.*

*A debt was recovered by the judgment of the County Court with costs. The debt alone having been paid, the clerk of the County Court refused to issue executions for the costs.*

*Held, that before coming to this court for a mandamus to the clerk, application should be made to the judge of the County Court to order the clerk to issue execution.*

THIS was an application for a rule calling upon the clerk of the Southwark County Court of Surrey to show cause why a *mandamus* should not issue, commanding him to issue execution against the goods of John Gore, for the sum of 5*l.* 2*s.* 8*d.* A plea having been entered in the Southwark County Court, in which the overseers of the parish of Christchurch, Surrey, were plaintiffs, and John Gore the defendant, judgment was recovered for the amount claimed, and 5*l.* 2*s.* 8*d.* costs. The amount recovered was paid to the plaintiffs, but not the costs. Application was made to the clerk of the County Court to issue execution for the costs only, but he refused to do so, on the ground that, in analogy to the proceedings in the Superior Courts, the writ of execution must follow the judgment. The affidavit in support of the rule, did not state that any application had been made to the judge of the County Court to order the clerk to issue execution.

*Collier*, in support of the motion.—The clerk of the County Court acted wrongly in refusing to issue execution, and this court will compel him to do so by *mandamus*. The 9 & 10 Vict. c. 96, s. 94, enacts that, “whenever the judge shall have made an order for the payment of money, the amount shall be recoverable, in case of default or failure of payment thereof forthwith, or at the

nes, and in the manner thereby directed, by execution of goods," &c., "of the party against whom such order made; and the clerk of the said court, at the request of the cutting such order, shall issue, under the seal of the court, *ex vi facias* as a warrant of execution to the high bailiff of who, by such warrant, shall be empowered to levy or levied by distress and sale of the goods," &c., "such levy as shall be so ordered," &c. That section imposes on the clerk of the court of issuing execution for any the sum which remains unpaid. The form of execution goods of the defendant, contained in the appendix to les, after reciting the judgment of the court ordering be paid, recites also:—"And whereas the said sum of or the sum of £ , being part of the said sum of as not been paid pursuant to the said judgment." Both and the form contemplate execution issuing for a less that named in the judgment. There is no analogy execution in the County Court, and one in the Supre-, where the writ of execution must closely follow the re judgment, the amount to be levied being indorsed in the County Court the execution issues under the ers, and in the form provided by the act. [WIGHT- Dught you not to have applied to the judge of the urt in the first instance to order his officer to issue | There is no power given by the act to authorize the ke such an order. [WIGHTMAN, J.—Surely there must ower incident to his office.] On examining carefully ns of the act, there seem to be separate duties cast dge and the clerk. The judge is to adjudicate upon and to make the order for payment; but he has no ue execution. That power seems to be taken out of hands, and vested in the clerk.

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*Execution for*  
*costs—Practice.*

*Cur. adv. vult.*

, delivered the following judgment for  
AN, J.—The rule for a *mandamus* must be refused.  
ts are not satisfactory; as, before the clerk is called  
is court to issue execution, application should have  
to the judge of the County Court to direct him to issue  
nd the result of that application been made known to  
It is to be presumed that, if such an application were  
officer of the court would obey the direction of the

*Rule refused.*

## COURT OF QUEEN'S BENCH.

## COUNTY COURT APPEAL.

November 26, 1851.

(Before COLLIERIDGE and ERLE, JJ.)

KILHAM v. COLLYER.

*Incoming and outgoing surveyor of highways—Remedy for balance  
5 & 6 Will. 4, c. 50.*

*At a vestry meeting to examine the accounts of an outgoing surveyor certain items were objected to, and an opposition threatened by the justices. Upon this, he offered to pay 50l. if no opposition was made to that effect, which offer was accepted, and a minute made to that effect by the plaintiff and other vestrymen, together with a further entry on the foot of the account that the 50l. must be paid to the defendant's successor in office. The accounts were accordingly passed without opposition, but the defendant did not pay the 50l., and the plaintiff having been appointed the successor of the defendant in office, he brought an action for the amount in the County Court.*

*Held, that there was no evidence of a contract between the plaintiff and the defendant to entitle the former to maintain an action alone for the 50l., and that, if the 50l. was to be considered as a balance in the hands of an outgoing surveyor, the proper proceeding would be under section of 5 & 6 Will. 4, c. 50.*

THIS was an appeal from the decision of the judge of the County Court of Lincolnshire. The plaintiff stated that the defendant (Kilham) was indebted to the plaintiff (Collyer) in 50l., agreed to be paid by the defendant to the plaintiff, the surveyor of highways in the parish of Tyd St. Mary, in discharge of all claims upon the defendant in respect of the legal charges of Messrs. Sturton and Key for the parish of Tyd St. Mary aforesaid between the 6th of April, 1849, and the 6th of April, 1850; or in respect of any amount appearing due from the defendant to the said Collyer, surveyor, on the passing of the accounts of the said Kilham as surveyor of the highways of the said parish for the year ending the 26th of March, 1850, and, in consideration of the withdrawal of all opposition by the said Collyer and by other parishioners of Tyd St. Mary to the passing of the accounts of the said Kilham as such surveyor of highways as aforesaid by the justices of the peace having jurisdiction therein, the particulars of which were thereto annexed. The particulars of the plaintiff's demand were as follows: "To amount offered by you at a vestry meeting of the parish of Tyd St. Mary, held on the 10th of April, 1850, to be paid

of Messrs. Sturton and Key, provided that no opposition be offered to passing the accounts when presented to the magistrates for their approval, and which offer was by such vestry made, 50*l*."

The facts were these:—The defendant was surveyor of the highways of the parish of Tyd St. Mary, in the county of Lincoln, for the year ending the 26th of March, 1850. At a vestry meeting of the said parish, on the 24th of March, 1850, in which the defendant's accounts as surveyor were examined, objections were made to an item of 106*l*. 7*s*. for law expenses paid to Messrs. Sturton and Key, being the extra costs of certain appeals against the vestry for stopping up and diverting certain highways in the parish, which appeals had been defended by the defendant without having obtained the sanction of a meeting of the parishioners. At the meeting, the accounts were not passed and allowed in the vestry, but an adjournment took place to the 10th of April, and it was intimated that an opposition to the passing of the accounts by the justices would be made.

The adjourned vestry meeting on the 10th of April, the defendant was present, and the defendant, by his attorney, offered to pay himself towards Messrs. Sturton and Key's bill, if the objection to the passing of his accounts were withdrawn; and it was resolved by a majority that this offer be accepted. A deed to that effect was entered, and signed by the plaintiff and most all the parishioners present. At the same meeting, at the passing of the defendant's account, after the balance against him was 10*s*. 2*d*., the defendant's attorney, in his presence, added the following words:—"To be contributed by Mr. Kilham, pursuant to his bill, 50*l*. Actual balance, including rates in arrear, 10*s*. 2*d*." The following entry was also made and signed by the plaintiff and all the parishioners who had signed the minute:—"The foregoing accounts approved by us in vestry assembled, and the sum agreed to be contributed by Mr. Kilham, be paid to his successor in office at the time of his passing his accounts before the magistrates." The plaintiff had been appointed surveyor to the defendant as surveyor of the highways, at a vestry meeting held on the 25th of March previous. No opposition was made before the magistrates, who accordingly passed the accounts. The defendant did not pay the 50*l*. at the passing of the accounts. Subsequently the plaintiff demanded it, but the defendant refused to pay it, and this action was thereupon brought in the County Court.

On the hearing, the County Court judge decided that in law the plaintiff was entitled to recover the 50*l*., and gave judgment accordingly.

*Alley*, (Phipson with him) for the appellant, the defendant. —The plaintiff below, as the newly-appointed surveyor of the highways, had no right to maintain this action against the defendant's predecessor in office. The action, if maintainable at all, ought to have been brought by all the members of the vestry who were present, and not by the plaintiff alone, in consequence of the arrangement made with the defendant. There was no

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contract between the parties to this plaint alone, if the plaintiff as the new surveyor claims the 50*l.* as part of the balance due from the defendant, it is submitted that no action will lie on an account, but the proper proceeding for enforcing payment will be by the summary method pointed out by the statute 5 & 6 Geo. 4 c. 30, s. 103. The case of *Underhill v. Ellicombe*, 1 M. & C. 450, is on all fours with the present. Their debt for corporeal money for highway rates was held not to lie, inasmuch as it was given by a statute which provided a particular remedy was stopped by the court; he also cited *Longridge v. L* 5 B. & Ald. 122.)

*J. Brown* for the respondent (the plaintiff below).—The argument made was, that the vestrymen would not oppose the demand of the defendant's accounts, and that the defendant should pay the plaintiff the 50*l.*; the intention being to put the plaintiff in the same situation as if the 50*l.* agreed to were part of the balance due from the defendant. The vestry never contemplated entering into any personal contract, the intention of the parties at the time of the arrangement being consideration by which the court will be governed: (*Lancaster v. Frewer*, 2 Bing. 361; *Wallace v. Kelsall*, 7 M. & W. 264.) The question of fact for the judge of the County Court, whether the contract was made with the plaintiff alone or with all the vestrymen, this court will not review his decision on a question of fact. The plaintiff is acting as a sort of trustee for the parish. Where a contract depends partly upon written documents, and partly on the circumstances, what that contract is, is a question of fact for the jury, and not of law for the judge: (*Moore v. Garwood*, 4 Ex. 681.) [COLERIDGE, J.—The judge never says that there was no contract with the plaintiff alone; he says that there was a promise to pay him, but the consideration for that promise moves from the plaintiff but from the vestry.] It has been held, that the party for whose benefit the promise is made may bring the action. [COLERIDGE, J.—If the plaintiff be as to this matter a parish officer, he falls within the provisions of the statute, and may pursue the course therein provided.] There is no objection on point of law, to the old surveyor making a contract with a new surveyor to pay him a sum of money, and on such a contract a new surveyor might sue; this is not an action for a promise, and there is nothing contrary to public policy in the arrangement. [COLERIDGE, J.—I quite agree that if there be any evidence in this case as the judge filled the situation of jury, it would be for him to determine what weight was due to it. I am simply to the facts of this case, I can see no evidence what contract was made or intended to be made between the plaintiff and the defendant. The real contracting parties were the defendant on the one hand, and the vestry on the other. The intention of the vestrymen was, that they should see the money paid, and if it were not paid, that they should object to the account. They made no distinction between themselves and the plaintiff.]

121. The judge did not look at the case in the view suggested counsel for the respondent, but he seems to have thought action might well be brought upon the promise made by the defendant to the vestry, that he would pay his successor in office. Therefore, there was no evidence of any contract between the defendant and the plaintiff alone, the action brought by the latter cannot be maintained.]

S. J.—None of the legal requisites of a contract appear in evidence. A contract consists of a consideration moving from the plaintiff to the defendant, and a promise from the other party upon that consideration. Now there is no consideration to the plaintiff in this case. What induced the defendant to make the promise to pay the plaintiff did not move from the plaintiff from the vestry; it was also urged, that the action might be brought on the ground that the incoming surveyor can maintain an action against the outgoing surveyor for the balance due, the answer is, that the remedy is not by action but by summons and application under the statute.

*Judgment reversed.*

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balance of  
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## COURT OF QUEEN'S BENCH.

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MOUSLEY v. LUDLAM.

*Landlord and tenant—Outgoing tenant—Farm draining—Custom of country.*

*It is nothing unreasonable in a custom that the landlord should be liable to the outgoing tenant of a farm for a certain proportion of the expenses incurred in draining, whether the expenses were incurred with the landlord's consent or not, if they were incurred properly and according to the rules of good husbandry.*

There was an appeal against a decision of the judge of the County Court of Derbyshire, in an action brought by the outgoing tenant of a farm against the landlord, to recover the sum of £100 or in respect of the plaintiff having relinquished and given up to and in favour of the defendant, and at his request, a farm, lands and premises, with the appurtenances, and the advantages of work done, manure, sowing, tiles, and

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for draining by  
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other materials, expended and bestowed by the plaintiff about the cultivation and improvements thereof, together with stone, posts, grass, herbage, crops, chattels and effects growing and being thereon. It appeared that the defendant was a yearly tenant to the defendant of a farm in Derbyshire, by his agreement with his landlord he was bound to cultivate the land according to the rules of good husbandry, and according to the custom of the country. The tenancy had been determined by a six months' notice from the landlord, and the plaintiff had quit possession at Lady-day, 1847. The plaintiff, during his occupation of the farm, had executed some tile and brick drains without the consent or knowledge of the defendant, and the plaintiff's claim included charges under each of the heads mentioned in the plaintiff's plea. For draining which had been done two years before the plaintiff's claim, the defendant charged five-sevenths, and for that which had been done one year only he charged six-sevenths of the cost. The plaintiff gave evidence to show that the custom of the country was, that an out-going tenant on quitting the farm was entitled to a claim from the landlord compensation for crops, and other improvements mentioned in the claim, and that where a tenant had expended money in tile-drainage, the landlord was liable to repay him five-sevenths of that expense, whether incurred with his knowledge and consent or not. For the defendant, proof was offered that the landlord was not to pay such proportion of the expense as the defendant claimed, they were incurred with his consent. The learned judge directed the jury that what was the custom of the country was in this matter of evidence, which depended on the credit they gave to the witnesses on one side or the other. The verdict was given for the plaintiff. The appeal was against the above direction.

*Phipson*, for the appellant (the defendant below).—I think the judge misdirected the jury; for, though the actual existence of the custom, which is clearly legal and reasonable, is to be decided as a matter of fact by the jury, it is for the judge to say, in the first instance, whether the custom set up is reasonable; and here he has told the jury that the custom alleged by the plaintiff is unreasonable and void: (*Dalby v. Hirst*, 1 B. & B. 224) it is unreasonable to say that, by custom a tenant may be at liberty to do as much tile-draining as he pleases, at the expense of his landlord. [COLERIDGE, J.—Is that involved in this? The tenant is bound to cultivate according to the rules of good husbandry; and it is fairly to be implied that this drain is to be done. The defendant's case here is, that however much tile-draining may be done, he is not to pay for it, unless it is done with the knowledge and consent.] The custom, as found, is not unreasonable. [ERLE, J.—It must mean such tile-draining as a tenant under those terms may lawfully do. It was not suggested that this draining was superfluous waste.]

*Tomlinson*, contra, was not called upon.

COLERIDGE, J.—Here the tenant was, by the terms of the tenancy, to cultivate according to the rules of good husbandry.

good husbandry, especially at the present time, might be  
 ered to include draining. Is it then an unreasonable thing  
 ie custom should exist of the landlord making an allowance  
 r or less, according to circumstances, to reimburse the tenant  
 ie has expended in that way? Surely such a custom cannot  
 l on the face of it to be unreasonable, and if not, then the  
 on of fact was very properly left to the jury.  
 .E. J., concurred.

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 outgoing tenant.

*Judgment affirmed, with costs.*

## COURT OF QUEEN'S BENCH.

*Hilary Term, 1852.*

ORCHARD v. MOXHAY.

*Practice—Costs—Laches.*

*Attention was made on the 26th May to a judge at chambers to allow  
 plaintiff his costs under 13 & 14 Vict. c. 61, s. 13; the summons  
 dismissed, and the plaintiff's attorney accepted the damages, but  
 d that he did so without prejudice to his right to costs. On the  
 December following, notice was given, and in January the appli-  
 n was again made to the court:  
 held to be too late.*

PERSON, in this term (January 13th), obtained a rule  
 lling on the defendant to show cause why the plaintiff's costs  
 l not be taxed, and why the defendant should not pay the  
 it. The action was for false imprisonment; and the verdict  
 for the plaintiff with 40s. damages. The plaintiff resided  
 in the district of the Clerkenwell County Court, and the  
 ant within that of the Whitechapel County Court; and the  
 of action arose wholly within the Clerkenwell district. On  
 th May, 1851, a summons was taken out before Patteson, J.,  
 umbers, to show cause why the plaintiff's costs should not  
 ed and paid by the defendant. That summons was dismissed;  
 e defendant's attorney then offered to the plaintiff's attorney  
 amount of the damages in this and another action; for which  
 ipt was given in these terms:—"Received the 40s. in each  
 , without prejudice to the right of the plaintiff to costs."  
 e defendant's attorney in his affidavit, stated that he considered



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other materials, expended and bestowed about the cultivation and improvement of stone, posts, grass, herbage, crops, growing and being thereon. It appears by his agreement with his landlord that according to the rules of the custom of the country, by a six months' notice from the tenant, he was to be quit possession at the expiration of the term, without the consent or claim included charge of the plaintiff. For draining the defendant charged the defendant, which had been done one year. The plaintiff gave notice, that an order should be made for the claim from the defendant.

mentioned money in the seventh and corner of the land, they were to be put in the discretion of the jury.

**CAMPBELL, C. J.**—I think that this is true, the right to make this application; but to make it within a reasonable time. Now it was paid in May, and the plaintiff lies by till December, because there has been a decision of one of the judges of this court. It seems to me that that is not the way; and that if it were, the greatest inconvenience would follow. If this application might be made at any time, a party might find himself suddenly involved in costs, from which he had considered himself exempt, and which he might be unable to pay. The application had been made within a reasonable time, and he was in a situation to pay.

**PATERSON, J.**, concurred.

**COLERIDGE, J.**—We must act upon general principle; no rule can be more important than this, that a plain of an act done by a judge at chambers should not be brought before the court. Mr. Paterson was compelled to contend that the act was done at any time; and I think that the admission of the act put him out of court.

**WIGHTMAN, J.**, concurred.

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—  
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—  
*Certificate of  
judge for costs.*

Court for some legal difficulty, but here there is no do secondary has acted under the impression that he could a a case of concurrent jurisdiction.

By the COURT.—We can only look at the certificate. We presume that the learned judge has exercised a proper discretion and saw reasons to justify him in granting the certificate, the ground of there being concurrent jurisdiction, with had nothing to do.

*Rule re*

## COURT OF EXCHEQUER.

*Hilary Term, 1852.*

CROWLEY v. VITTY.

*Prohibition—Agreement—9 & 10 Vict. c. 95, s. 122.*

*A. entered into a written agreement with B. to take certain premises at a rent of 20s. a week, payable on demand, four weeks' notice party to be a valid and legal notice: subsequently the rent was by a verbal arrangement, to 16s. a week: and a plaint was entered in the County Court, under the 122nd section of the County Courts Act, to eject the tenant. It was sworn by the tenant that the yearly value was more than 50l.*

*Held, that the verbal arrangement did not discharge the original agreement; that there was no fresh demise; and a writ of prohibition granted accordingly to restrain the proceedings in the County Court.*

PRENTICE moved for a writ of prohibition to be directed to the judge of the County Court of Surrey, to restrain his proceeding with the above plaint, under the 122nd section of the County Courts Act, which enacts, that when the term of any house, land, or other corporeal hereditament is less than three years, and the value of the premises, or the rent payable in respect of the tenancy, did not exceed the sum of 50l. a year, and upon no fine shall have been paid, shall have ended, or shall have been determined by a legal notice to quit, and such tenant shall to deliver up possession of the premises, the landlord may bring a plaint in the County Court. This is a question of value, and was submitted that in this case the value and the rent of the premises exceeded 50l. a year. The defendant entered into an agreement with the plaintiff to take the premises, No. 54, Lower-

ambeth, on the following terms, which were contained in a memorandum of agreement, dated 15th January, 1849:—"Rent at a rate of 20s. per week, payable on demand by Messrs. Crowley." The defendant agreed to take his beer of Messrs. Crowley, and four weeks' notice to quit from any day and by either of the parties, to be a legal and sufficient notice. The defendant by his exertions, made good business, and he now swore that the premises were worth a year rent and 100*l.* premium for the goodwill. The rent had always been paid, and there was nothing due for beer. At the hearing it was objected that the County Court judge had no jurisdiction when the premises were worth more than 50*l.* a year, whereupon the case was adjourned, but later in the day judgment was given for the plaintiff. Plaintiff will now contend that there was a subsequent verbal agreement between the parties to hold the premises at 16s. a week rent, which created a new parole demise, and he acted so as to discharge the original written agreement: (*Lyon v. Reed*, 13 M. & W. 285; *Nicholls v. Atherstone*, 10 Q. B. 944; *Man v. Hartley*, 19 L. J. 323, C. P.) [PARKE, B.—But this would be a fresh demise to the same tenant, and those cases do not apply.] You may give evidence to discharge an agreement, but not to alter it: (*Marshall v. Lynn*, 6 M. & W. 109.) (a) To operate as a discharge, it must act by way of estoppel; here there is no estoppel. "The acts in pais which bind parties by way of estoppel are acts of notoriety; not less formal and solemn than the execution of a deed; as for instance, livery, entry, acceptance of an estate, and the like:" (*Lyon v. Reed*.) This does not amount to a reletting; there is no consideration for a second agreement, neither does it operate as a surrender in point of law. The "surrender," by operation of law, is properly applied to cases where the owner of a particular estate has been a party to some act the validity of which he is by law afterwards estopped from denying, and which would not be valid if his particular estate continued to exist. It must be some act which the party is estopped from denying. The first objection is, that in this case there is no reletting. Nothing but a verbal agreement, without consideration; and, secondly, if there is sufficient to show the verbal agreement, it does not operate as a surrender by operation of law of the preceding written agreement. He referred also to *Thompson's*, L. C. 459*d*, 459*f*. The Courts of Queen's Bench and Exchequer are at variance on the point, and, under any circumstances, the case is one of fair and reasonable doubt, sufficient to entitle the court to grant a prohibition, in order that the matter may be discussed.

*Pearson* showed cause in the first instance.—First, then, there is no surrender by operation of law within the principle laid down in *Lyon v. Reed*. A new tenancy has been created. The defendant paid the reduced rent of 16s. a week on three occasions,

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(a) That case decided that where a contract for the bargain and sale of goods is made, and a time for the delivery of them, an agreement to substitute another day for that purpose, in order to be valid, be in writing.

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—  
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and he also submitted to a distress for that amount; and were acts of such notoriety as to come within the principle case. *Nickells v. Atherstone* is in my favour. He cited *Monck v. Geekie* (5 Q. B. 841; *Clarke v. Moore* (1 J. Latouche, 723), is in point. There it was held that a verbal agreement to accept a lesser rent than that mentioned in an agreement to grant a lease, followed by acceptance thereof, is not a abandonment of the former contract; nor does it operate as a substitution of a new agreement for the former one, or creation of a new tenancy, in which the old one merged. Consideration for the abatement of the rent is the continuance of the relation of landlord and tenant: (*Buckworth v. Simp Benner*, 1 C. M. & R. 834.) There is ample evidence that the premises were not worth 50*l.* a year. [MARTIN B.—] swear they are worth less than 50*l.*] *Prentice*—No; we say they are worth 60*l.*, and 100*l.* for goodwill: (*Gore v. Wrigley* & E. 118.) It is for the County Court judge to use his own judgment of the value, and, if I can suggest any state of facts he might decide upon, that will be sufficient. [ALDERSON.] What do you say to a case of this sort? Suppose a man takes a piece of land and pays 25*l.* a-year ground-rent, and he has a house on it worth 500*l.* a-year, do you mean to say that the owner of the land could in such a case go to the County Court and demand a section to turn out his tenant.] No; in that case the plaintiff would be made instead of a fine, and would not come within the section.

POLLOCK, C. B.—We must read the act as we find it; the word “fine,” and you want us to read it something else.

MARTIN, B.—I have thought it over, and cannot see how a second agreement could prevent the landlord recovering the amount of rent.

PARKE, B.—It only amounts to this; the landlord may, if you please, hold it at a lower rent; there is no coercion, and no clear intention to make a fresh demise.

By the COURT.—*Rule absolute for a prohibition.*

## COURT OF QUEEN'S BENCH.

*January 30, 1852.*

REG. v. POLLOCK.

*Jurisdiction—Seamen's wages.*

*in for seamen's wages, which involved a question of the master's right to disrate the claimant, had been adjudicated upon by a justice of the peace, under stat. 7 & 8 Vict. c. 112, s. 15. The claimant did not draw up or serve the magistrate's order;*

*that a judge of a County Court was right in refusing to try an action of debt for the balance of wages brought in respect of the same matter.*

**THIS** was a rule calling upon the judge of the County Court of Lancashire, held at Liverpool, to show cause why a *mandamus* should not issue, requiring him to enter adjournments, and a cause of *Williams v. McIntyre*, in which it was at first suggested the judge had nonsuited the plaintiff, but which, as it now appeared, the judge had struck out upon the ground that he had no jurisdiction. The particulars annexed to the plaint (which appeared to be on contract) were "for 18*l.* 5*s.* as a balance of wages due to the plaintiff, and upon an account stated." It appeared that the plaintiff, having been mate, was disrated and reduced to a common seaman by the captain. The legality of this rating was questioned by the plaintiff, who claimed the whole of his wages as mate from the defendant, who was the owner of the vessel. The plaintiff had previously taken out a summons before a justice of the peace, under stat. 7 & 8 Vict. c. 112, s. 15, having heard the case expressed his opinion that the plaintiff was entitled to his full wages as mate down to the time when he was disrated, and as seaman from that time. The plaintiff had not drawn up or served the magistrate's order.

**Mr. Milnes** now showed cause, and contended that the judge of the County Court had rightly declined to try the claim. He contended that, by the stat. 7 & 8 Vict. c. 112, s. 15, a justice of the peace alone had jurisdiction over questions that arose upon a claim for a seaman's wages, and that at all events the matter had been already adjudicated upon by a competent tribunal before the case came to the County Court.

**Mr. Pollock**, *contra*, contended that the action in the County Court was not a mere claim for balance of wages, but for a breach of contract, in which the question was, whether the captain was jus-

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—  
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tified in disrating the plaintiff, which question the judge ought have tried.

LORD CAMPBELL, C. J.—I am of opinion that this rule ought to be discharged, and with costs. The application appears to be wholly without foundation; and, if the court had been of the real facts of the case, the rule would never have been granted. The plaintiff first went before a magistrate, who heard the complaint, and adjudicated upon it; but, not being satisfied with that adjudication, he went before the judge of the County Court. When before the County Court, he still treated his claim for a balance of wages, both in his plaint and when he appeared before the judge. The learned judge then said he had no jurisdiction because the Legislature had confined such matters to a magistrate who had already heard and adjudicated upon them. The court will not, in such cases, call upon judges to send up notes, and justify what they had done. If they refuse to perform their duty, this court will issue a *mandamus* to compel them to do it; if they exceed their powers, the court will issue a prohibition to restrain them. But where they appear to have acted as the County Court has done, in declining jurisdiction with perfect propriety, they are entitled to the protection of this court, which will be given with the highest respect on their honourable position.

The rest of the court concurred.

*Rule discharged, with costs.*

## COURT OF QUEEN'S BENCH.

*January 31 and February 10, 1852.*

CRAKE v. POWELL.

*Concurrent jurisdiction—Costs—Discretion of the court or judge—*  
 13 & 14 Vict. c. 61, s. 13.

*the court or a judge at chambers has not a discretionary power under the 13th section of 13 & 14 Vict. c. 61, which provides that where less than 20l. is recovered in an action in the superior courts, and it shall be made to appear to the satisfaction of the court or a judge at chambers that the action was of the description therein specified, such court or judge "MAY thereupon by rule or order direct that the plaintiff shall recover his costs," but that section confers an authority upon the court or judge to grant costs which is imperative in cases falling within that section.*

*Confirming Macdougall v. Paterson, ante, 544.*

*THIS* was an action for goods sold and delivered, tried before the Secondary of London, when a verdict passed for the plaintiff for 4l. 12s. 6d.

A rule was afterwards obtained calling upon the defendant to show cause why the Master should not tax and allow to the plaintiff his costs of the trial, on the ground that the plaintiff and defendant resided more than twenty miles from each other.

*Lush* showed cause.—This is the same question as was raised in *Macdougall v. Paterson* (*ante*, 544), where the Court of Common Pleas overruled the cases of *Jones v. Harrison* (*ante*, 489), and *Boyer v. Richards* (20 L. J. 323, Ex.) It turns entirely upon the instruction to be put upon the 13th section of 13 & 14 Vict. c. 61, which provides that if the plaintiff in an action in a Superior Court, in which less than 20l. is recovered, shall make it appear to the satisfaction of the court or a judge at chambers that the action is brought for a cause in which concurrent jurisdiction is given to the Superior Courts by the 9 & 10 Vict. 95, s. 128, or for which no plaint could have been entered in any such County Court, or that the said cause was removed from a County Court *certiorari*, in any of such cases the court or the judge may thereupon, by rule or order, direct that the plaintiff shall recover his costs. Sect. 11 absolutely prevents the plaintiff from recovering costs where the verdict is under 20l., unless, under sect. 12, the judge certifies that no plaint could have been entered in any County Court, or that there was sufficient reason for bringing the

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cretion of judge  
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action in the Superior Court; but it is not pretended clause is imperative. The judge at Nisi Prius has a discretion to exercise, and may refuse to certify; and yet it is clear that, under sect. 13, the court or a judge at chambers is allowed the plaintiff's costs, upon its being proved that the action could have been entered in a County Court. The true position is, that the cases excepted from sect. 11 are those in which the judge certifies under sect. 12.

*Griffiths, contra.*—There is no doubt that the word "may" often been held as importing an obligation, and not conferring a permission merely; and it must be so construed in this case, because sect. 11 excepts all the cases afterwards mentioned in sect. 12 and sect. 13; and so the right which the plaintiff has to recover his costs under the statute of Gloucester is not taken away. (Upon the effect of the word "may," he cited *Alderman v. Bury* (1 Vern. 152); *R. v. Barlow* (2 Salk. 609); *Parnall v. Lancaster Canal Company* (3 Nev. & P. 523); *R. v. Commissioners of the General Land Office* (19 L. J. 177, Q. B.) He referred also to *R. v. Steward of Havering-atte-Bower*, 5 B. & Ald. 691.

*Cur. au*

LORD CAMPBELL, C. J., now delivered the judgment of the court.—In this case we are for the first time to decide under section 13 of the 13 & 14 Vict. c. 61, it is discretionary with the court or judge at chambers to direct that the plaintiff recover his costs where it is made to appear to the satisfaction of the court or judge that the action was brought for a cause in which concurrent jurisdiction is given to the Superior Court and the County Courts, for which no plaintiff could have been entered in a County Court, or that the cause was removed from a County Court by *certiorari*. We have the advantage of finding that the question has also been decided by the Court of Exchequer, the Court of Common Bench, and decided in two ways. Had we to discharge our duty, considered very attentively the provisions of the statute, and the reasons given by the learned judges in the several cases, we agree with the reasons of the latter, the result of which, therefore, we need not repeat. We will only observe in looking to discover in what sense the word "may" is to be used by the Legislature, we are struck by the consideration that the 11th section of the 13 & 14 Vict. c. 61, taking away the right to costs which before existed, exempts from its operation the cases "hereinafter mentioned." It therefore seems expedient to declare that in the three cases provided for in sect. 13 the plaintiff shall still be entitled to costs, and he shall recover those costs by rule or order for that purpose. If the plaintiff be entitled to costs, and the court or judge decline to make a rule for that purpose, *in jure* he may call upon the court for judgment. Mr. Lubbock advanced a new argument, from this being left discretionary by sect. 13, that the judge at the trial in a cause in which the action was brought for a cause in which a plaintiff could not have been entered in a County Court, but however strange it may seem that this case should com-



sect. 12 as well as sect. 13, it could hardly have been the intention of the Legislature to expose the plaintiff to the peril of ultimately paying his costs when he had no choice, and was driven to seek his remedy in one of the Superior Courts. In this case, it being proved to our satisfaction that the action was brought in a case in which concurrent jurisdiction is given by reason of the parties residing at a distance, we are of opinion that we are bound to direct that the plaintiff shall recover his costs, and the rule will therefore be absolute.

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*Jurisdiction—  
Costs—Dis-  
cretion of judge  
of Superior  
Court or Court  
to make order.*

*Rule absolute.*

## COURT OF QUEEN'S BENCH.

*February 10, 1852.*

*Ex parte W. RAMSHAY, Esq.*

*County Court judge—Power of dismissal—Inability or misbehaviour, how to be tried—Quo warranto—9 & 10 Vict. c. 95, s. 18—Construction.*

*Under 9 & 10 Vict. c. 95, s. 18, the Lord Chancellor has power to remove from his office a County Court judge, on the ground of inability or misbehaviour; and where the party complained against has had a fair opportunity of being heard, where the charges, if true, amount to inability or misbehaviour, and evidence has been given in support of them, the court cannot inquire upon affidavits into the amount or balance of evidence; and will not grant a quo warranto in order that the mere question of fact may be submitted to a jury.*

MR F. KELLY, on the last day of Hilary Term, moved for a rule calling upon Joseph Pollock, Esq., to show cause why an injunction in the nature of a *quo warranto* should not issue, requiring him to show by what authority he exercised the office of judge of the County Court of Lancashire, held at Liverpool. It appeared from the affidavits, that Mr. Ramshay was appointed judge of the County Court of Lancashire, held at Liverpool, by the Earl of Derby, as chancellor of the Duchy of Lancaster, early in 1850, and that he continued to hold the office and discharge the duties of it down to November, 1851, when he was removed under the circumstances mentioned in the affidavits. The affidavits also contained the highest testimony to the character and conduct of Mr. Ramshay whilst he continued in that office. [LORD CAMPBELL, C.J.] We cannot enter into the merits of the case. It is competent for Mr. Ramshay to raise by this proceeding the question of his

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*Dismissal of*  
*Judge—*  
*Quo warranto.*

inability or misbehaviour, so that it may be tried by a [LORD CAMPBELL, C.J.—Can we grant a *quo warranto* on ground that the Earl of Carlisle, having heard both parties come to a wrong conclusion?] The decision of the Chancellor not less open to question than that of a rector who removes a parish clerk for misconduct; and it is a common practice to issue a *mandamus* to the rector to admit a clerk, where the effect would raise a fair question whether he has been rightly dismissed. The due cause of dismissal is a question for the jury: (*R. v. W. Cowp.* 370.) In the present case, the authority of the Earl of Carlisle depends upon sect. 18 of 9 & 10 Vict. c. 95, which provides that “it shall be lawful for the said Lord Chancellor, or the whole of the district is within the Duchy of Lancaster, the Chancellor of the said duchy, if he shall think fit, to remove any such judge already appointed or after to be appointed.” Similar words are used in sect. 24, which authorizes the judge of the County Court to remove the “in case of inability or misbehaviour,” subject to the appeal to the Lord Chancellor. In both cases, the jurisdiction to remove depends upon the existence of the fact. Unless there is inability or misbehaviour, there is no power to remove; and upon a question of fact, the decision of the Chancellor or the judge is open to review. In *R. v. Owen* (*ante*, 368), this court so held, because there a *quo warranto* was granted; a question of inability or no inability was raised before a jury. It was the only course consistent with justice; because this act of removal has not furnished the Chancellor or the judge with any ground for instituting judicial inquiry into the conduct of the officer removed; there is no power to administer an oath; the most that can be done is to institute a species of domestic investigation as a master might institute into the conduct of his apprentice, and it is highly improbable that the Legislature should have intended such an inquiry to be final and conclusive, where the fortune and character of important functionaries is at stake. [LORD CAMPBELL, C.J.—In *R. v. Owen*, it was made known to the court that the single complaint against the clerk was that he could not pay his debts. It was admitted that he exercised his office well in every respect; and the single question was whether in point of law insolvency amounted to inability. I cannot show that nothing was imputed to Mr. Ramshay, when the point of law, amounts to inability or misbehaviour, then the decision in *Owen* will be an authority for you, but not otherwise. You are not to grant a new trial before a jury.] In what other way is the fact to be ascertained? The decision upon the fact may be impeached, as well as the decision in point of law. In *R. v. Owen*, the decision was impeached on the ground that there was no inability, and the judgment of Erle, J. is clear and expresses the law. “The judge of a County Court may discharge the clerk in case of inability; but the clerk has a right to raise the question whether that inability exists, and that question is for a jury to decide.”

ED CAMPBELL, C.J.—That language was used after the *quo warranto* had issued; and when the learned judge was considering, the materials to be presented to the court on the application he writ, but the effect of the special verdict.] The judge was considering the effect of the act of Parliament, which makes the decision depend upon the fact. The judge or the Chancellor, in any case may be, is unquestionably the sole judge of the degree of inability or misconduct which will render dismissal necessary or proper, and he must of course, in the first instance, decide whether there is any inability or misbehaviour, which will give him jurisdiction; but if it can be shown that he is wrong upon that point, his authority to remove is altogether gone. The court therefore must look into the affidavits, to see whether they raise a fair question for a jury, whether there was *any* inability or *any* misbehaviour. In *R. v. Owen*, the argument turned upon the question whether the fact of inability was not a condition precedent to the right to remove. [PATTESON, J.—On the motion for the *quo warranto* there was no such argument. It was admitted then that the only ground of removal was insolvency, and the question was whether that was inability within the meaning of the act. LORD CAMPBELL, C.J.—Without that admission I do not think that the *quo warranto* would have been granted in that case.] There are other grounds for this application. The inquiry before the court of Carlisle at Preston, was founded upon a memorial stating a specific complaint against Mr. Ramshay with reference to the imprisonment of Mr. Whitty; but the inquiry itself was extended between thirty and forty other charges, of which Mr. Ramshay had no legal notice, and the Earl of Carlisle had received no previous complaint. The investigation lasted about a fortnight, and an application for further time, made by Mr. Ramshay, was refused. About a month afterwards, without any further notice, and without any adjournment of the inquiry, the Earl of Carlisle issued to Mr. Ramshay the formal instrument of dismissal for inability and misbehaviour, accompanied with a letter expressing regret at the conclusion at which he had been compelled to arrive, intimating his opinion that Mr. Ramshay had not the degree of self-command necessary to enable him to discharge the duties of the office. It is impossible, therefore, to know the precise ground of dismissal. It may have been the commitment of Mr. Whitty; it may have been other matters of which Mr. Ramshay had no notice; it may have been inability, or it may have been misbehaviour; and if it was inability, then, assuming all the charges to have been true, there is no pretence for the dismissal on that ground. Further, before the judgment was pronounced against him, he ought, at all events, to have had the opportunity of being heard again, as even then he might have cause to show that he should not be removed: (*Ex parte Kinning, ante*, 16.) The proceedings cannot be blended into one. Here a single decision was made. Upon the inquiry into that, other charges are made, and evidence received in support of them, and then without

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Dismissal of  
Judge—  
*Quo warranto*.

*Ex parte*  
*RAMSHAY.*

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*Dismissal of*  
*Judge—*  
*Quo warranto.*

more, there is a general sentence of dismissal, simply following the words of the act of Parliament.

*Curr. adv. vult.*

#### JUDGMENT.

LORD CAMPBELL, C. J.—This was a motion for a rule to show cause why an information in the nature of a *quo warranto* should not be filed against Joseph Pollock, Esq., calling upon him to show by what authority he exercises the office of judge of the County Court for Lancashire, held at Liverpool. The ground of the application is, that when he was appointed to the office it was vacant, William Ramshay, Esq., who before filled it, not having been lawfully removed from it: the question which we have to consider, therefore, is whether, upon the affidavits laid before us, Mr. Ramshay is entitled to question the legality of his removal by a *quo warranto* against his successor? This depends upon the true construction of the 9 & 10 Vict. c. 95, s. 18, whereby it is enacted—“That it shall be lawful for the Lord Chancellor, or, where the whole of the district is within the Duchy of Lancaster, for the chancellor of the said duchy, if he shall think fit, to remove for inability or misbehaviour any such judge already appointed, or hereafter to be appointed.” By a formal instrument, under the hand and seal of George Frederick, Earl of Carlisle, Chancellor of the Duchy of Lancaster, within which the whole of the district of this County Court lies, Mr. Ramshay, before the appointment of Mr. Pollock, was removed for inability and misbehaviour. We are of opinion that this instrument is not absolutely conclusive that the Chancellor, in the exercise of the authority to displace from the office, is, in the language of the judges, in *R. v. Warren* “subject to the control of this court,” and that (as is there said) we may inquire into “the cause and manner of a motion.” We cannot insist that the instrument of removal shall set out all the proceedings instituted in order to the removal, with the special charges showing inability or misbehaviour, or the evidence adduced to support these charges. The instrument being drawn up in the words of the act of Parliament, we may presume that the Chancellor has duly exercised his jurisdiction till the contrary is proved. But we think that it would have been open to Mr. Ramshay, to show that he was removed without notice of any charges against him, or without an opportunity of being heard in his defence, or that no evidence was adduced to support the charges, or that the complaints against him were not for inability or misbehaviour in his office, and were of such a nature that, if proved or admitted, they would not disqualify him for his office, or amount to “inability” or “misbehaviour” within the meaning of the act of Parliament. Upon such affidavits we think we should have been bound to grant a rule to show cause for a *quo warranto*, with a view to his being afterwards restored to his office, from which he had been illegally removed. We have to see that judges and functionaries vested with judicial authority do not exceed their

y. The Chancellor has authority to remove a judge of a County Court only on the implied condition prescribed by the principles of eternal justice, that he hears the party accused. He cannot arbitrarily act upon such an occasion without some evidence being adduced to support the charges, and he has no authority to remove matters unconnected with inability or misbehaviour in his office of County Court judge. Where the party complained against has had a fair opportunity of being heard, where the charges, if true, amount to inability or misbehaviour, and where evidence has been adduced in support of them, we think we cannot inquire into the amount of evidence, or the balance of the evidence, the Chancellor, acting within his jurisdiction, being the constituted judge upon the subject. Looking to the affidavits on which this motion was made, they appeared to us to be insufficient to rebut the presumption that the removal was regular and legal. The affidavits strongly assert Mr. Ramshay's uniform good conduct as a judge, as well as his ability, and they particularly seek to justify his conduct on some occasions, when he was supposed to have acted improperly, as in fining the editor of a newspaper for contempt of Court. But Mr. Ramshay does not say that grave charges of misbehaviour as a judge were not brought against him, or that he had no notice of those charges, or that he had not a fair opportunity of being heard upon them, or that evidence was not adduced to support them. Consistently with these affidavits, the proceedings may have been regularly conducted, and there may have been evidence before Lord Carlisle sufficient to support the charges, and to warrant the judgment. Sir Fitzroy Kelly contended that, on the just construction of the statute, this court is bound to grant a *quo warranto*, so that the merits of the case may be ultimately determined by a jury. But we are of opinion that when the Chancellor has duly acted within his jurisdiction in the exercise of his authority, giving notice to the party accused of the charges against him, those charges, if true, amounting to inability or misbehaviour in his office, inquiring by evidence into the truth of the charges, and hearing the party accused—the Legislature intended the Chancellor's sentence of removal should be final and conclusive. Much stress has been laid upon the hardship which, on this construction of the statute, would arise to County Court judges, who certainly fill an office of great dignity and importance in the administration of justice. But such an argument can only be legitimately used to assist us in getting at the real meaning of the Legislature; when that is ascertained, we are not at liberty to be governed by any opinion which we may entertain as to the expediency, or even the justice of the enactment. But it may not be very improbable that the Legislature, amidst a choice of difficulties, intended to confer this power of removal, without an appeal to a court, upon the Lord Chancellor, or upon the Chancellor of the Exchequer, or upon the Chief Justice of Lancaster. These are high functionaries under the Crown, and directly responsible to Parliament for the due exercise of the authority committed to them. There must be a power

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*Dismissal of*  
*Judge—*  
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*Judge—*  
*Quo warranto.*

lodged somewhere of removing County Court judges, inability and misbehaviour. Practically, this power could be exercised by the Crown on the address of the two Houses of Parliament, according to the course prescribed for the removal of the judges of the Superior Courts of Westminster Hall, or by appeal to a jury, which it is supposed that the Legislature have contemplated, altogether free from inconvenience? It is due deference for juries in the exercise of their proper functions that the Legislature may have thought that the Lord High Chancellor of Great Britain, or the Chancellor of the Duchy of Lancaster, is likely to form quite as impartial and enlightened an opinion as a jury after hearing evidence on the subject, as to the ability and fitness of a judge in his office. Nor can we overlook the obstruction that would arise to the administration of justice in the country if the doctrine contended for. If, upon removal after an inquiry conducted, the appointment of a successor may be questioned by *quo warranto*, then, in every case in which affidavits can be obtained denying the charges and falsifying the evidence by which they were supported, a *quo warranto* may be obtained, and it is doubtful for many months whether all the proceedings by which a successor are not *coram non jure*, and void. This period may be prolonged for years by new trials, bills of exception, writs of error; all the expenses of this litigation may be thrown upon the successor who has accepted the office, having no right to believe that it was vacant; and, having done the duties of a judge with ability and integrity, he may be called upon to resign his salary upon which he has been subsisting, and he may be liable to actions at the suit of those whom *optima fide* he had, as the County Court, ordered to be imprisoned, or whose property had directed to be taken in execution on a judgment. But in all, we must look to the language which the Legislature employed, and put upon it its natural and grammatical meaning, nothing appearing to show that it is used in any extraordinary sense. "It shall be lawful for the Lord Chancellor, if he think fit, to remove for inability or misbehaviour any County Court judge." Is not the natural and grammatical meaning of the language, that if the Chancellor proceeds duly, he may, by appeal, remove for inability or misbehaviour, and that, having heard evidence, he is to determine whether inability or misbehaviour is made out. He is clearly constituted judge of the inability or misbehaviour in the first instance, and, if no appeal is given, or impliedly, his judgment must be final. No appeal is expressly given, and we think, to imply an appeal would be to legislate to construe the language of the Legislature. Sir F. Kelly has said much on the case of *Reg. v. Owen* (*ante*, 365), but on that case is examined, it will be found to be no authority. Although it proceeds on sect. 24 of the act, respecting the removal of a clerk by a judge, it would have been strongly in favour of the *quo warranto* had been there granted after the judgment alleged against the clerk charges, which, if true, proved inability.

misconduct, and, after due inquiry, and giving the clerk the opportunity of being heard, had dismissed the clerk upon the ground that the charges were substantiated. But, on inquiring what took place when the *quo warranto* was granted, we find that it was made out to the court that, instead of misbehaviour being imputed to the clerk, it was admitted that he had always performed the duties of his office honestly, and the only inability imputed to him was an inability to pay all his debts, without any suggestion that he had affected his mind, or in any degree disabled him from doing the duties of clerk. Therefore there was no imputation of inability or misbehaviour in his office; and, admitting the truth of what was imputed, no inability or misbehaviour in his office appeared. When the special verdict was argued, no question was made as to the right to the *quo warranto*, and the observations of the learned judges then must be taken with reference to the facts and points then before the court. Sir F. Kelly likewise relied on a class of cases respecting the removal of a parish clerk by an incumbent. But, supposing the Chancellor here has only the same power of removing the County Court judge which the incumbent has of removing the clerk at common law, no case has been cited where the incumbent having proceeded regularly against the parish clerk, bringing charges against him of misbehaviour in his office, giving him notice of those charges, and, after hearing evidence to substantiate them, and hearing the defence, dismissed the clerk on the ground that the charges were proved, this court interposed to restore him by *mandamus* on affidavit, that he was innocent, and the evidence against him was false. The case of *R. v. Warren* (sup. 320), which was mainly relied on, is not, by any means, to the effect. The report is short and unsatisfactory, but the rule shown cause seems to have been granted on the ground that the clerk was in prison when he was removed, and that he could not have been heard in his defence; that he had appointed a deputy, and that no misconduct in his office had been imputed to him. When he was shown, the court said,—“There is no sufficient reason signed in the affidavits that have been read upon which the court can exercise their judgment, nor is there any instance produced of misbehaviour in his office.” Therefore, supposing the clerk had been heard in that case as in the case of *Reg. v. Owen*, no inability or misbehaviour in the office was imputed, and the incumbent had no authority to remove him. Lord Mansfield there uses the expression which we adopt:—“He can never be the sole judge, and we cannot move him *ad libitum*, without being subject to the control of this court;” and “the court may inquire into the cause and manner of the removal.” But from the language of the judges, and the course of the proceedings, there can be little doubt that if the affidavits had shown that acts of misconduct in his office were imputed to the clerk, that he had been heard upon them, and that the incumbent proceeded on the belief of the evidence in support of the charges, the rule never would have been granted, and that, too, however numerous or strong might have been the affidavits to show that

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*Judge—*  
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 ———  
*Dismissal of*  
*Judge—*  
*Quo warranto.*

the clerk was innocent. We are therefore of opinion, th  
 construction of the act of Parliament contended for, neither  
 principle nor on authority, and that, unless some defect is  
 out in the manner in which the proceedings were conducted  
 case, we are not entitled to interfere. Sir F. Kelly com  
 that the charges having originated in a memorial of a soc  
 Liverpool, called the "Guardian Society," for miscond  
 fining a person of the name of Whitty, for a supposed insult  
 judge, other charges not contained in the memorial were afte  
 brought forward. But such an inquiry is to be conducted acc  
 to the substantial rules of justice, not according to technical  
 of special pleading. It is conducted as an inquiry befo  
 benchers of an inn of court, with respect to charges upon a  
 barrister may be disbarred, and can be conducted in no othe  
 the Legislature not having prescribed any formalities, a  
 having conferred the power of administering an oath. It  
 alleged by Mr. Ramshay in his affidavits that he was not  
 heard on all the charges brought against him. Complaint i  
 made of the time which elapsed between the close of the i  
 and the sentence of removal, and that no further notice was  
 to Mr. Ramshay to show cause why he should not be res  
 But the fair inference from the affidavits is, that the inqui  
 known to all parties to be finally closed, and that the Cha  
 of the duchy only took time deliberately to consider the evi  
 and to consider his judgment. Last of all, it is said th  
 solemn judgment, under his hand and seal, is restricted by a p  
 letter of the same date, written by Lord Carlisle to Mr. Ram  
 But, although a general liberty is given to Mr. Ramshay to  
 what use of it he pleased, one can hardly think that this ext  
 to the use of it in a court of justice, for the purpose of null  
 the dismissal. It was evidently written with a view of soft  
 as much as possible the pain to be inflicted in the discharge  
 public duty, and the sentiments there expressed are perfectly  
 sistent with the tenor of the sentence of removal; for it is po  
 that a man may have valuable qualities, and may be amia  
 private life, and yet may be justly removed for inability and  
 behaviour as a judge. For these reasons we are of opinion t  
 rule *nisi* in this case ought not to be granted.

*Rule refus*



## COURT OF QUEEN'S BENCH.

## COUNTY COURT APPEAL.

*February 11, 1852.*

(Before PATTESON and WIGHTMAN, JJ.)

GREAT NORTHERN RAILWAY COMPANY, Apprs., v.  
HAWCROFT, Resp.

*Carrier—Liability—Construction of contract.*

*granted an excursion ticket in the following form ;—"Barnsley's-cross and back. Excursion ticket, to return by the trains for that purpose on any day not beyond fourteen days after hereof." At the Barnsley station a bill was posted up, giving the hours of departure of excursion trains from Doncaster and from London. The Railway Company's line went from London to Doncaster and from Doncaster another railway conveyed passengers to Barnsley. The plaintiff, within the time limited, presented himself for a ticket from London to Barnsley by one of the trains advertised; refused for want of room; on the evening of the same day he journeyed to Doncaster by another of the advertised trains; but the day being Sunday, there was no train to carry him on from Doncaster to Barnsley.*

*the company had broken their contract with the plaintiff, first, by not taking him by the earlier train; secondly, by not carrying him from Doncaster to Barnsley.*

was an appeal from a decision of the judge of the County Court of Yorkshire, holden at Barnsley. The facts of the plaintiff's claim were, in substance, that the defendant had contracted with him to carry him from Barnsley to London and from London back to Barnsley, as a third-class passenger, within fourteen days from the date of his ticket. He journeyed within that period on the 9th of August last, to the Doncaster station of the company, at six o'clock in the morning. There were two trains advertised to go to Barnsley on that day, one at 8.15 in the morning, and the other at 9.15 in the evening. The morning train was so full that the plaintiff could not get a seat in it, though a special excursion train was started by the company in the middle of the day, he was not allowed to go by it. He therefore had to wait for the 9.15 train, which arrived at Doncaster at six o'clock on the Sunday morning. The defendants' agents waited at Doncaster, but passengers were usually sent to Barnsley by another line, belonging to the South Yorkshire Railway Company. The South Yorkshire Company, however,

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did not run any trains on a Sunday, and the plaintiff was therefore obliged to take carriage from Doncaster to Barnsley, for the cost of which he brought the present action. The ticket was in the following terms:—"Great Exhibition. Barnsley to King's-cross and back. Third class." On the back was this notice:—"Excursion ticket, to return by the trains advertised for that purpose, on any day not beyond fourteen days after the date hereof." At the Barnsley station a bill was posted up, stating the time that the excursion trains would leave Doncaster and London, and among them were the 6.45 and the 9.15 trains. The learned judge held that there was a special contract between the parties, and that the company were bound to carry the plaintiff from London to Barnsley by the 6.45 train, if he wished to go by it; but even if they had the option of taking him by the 9.15 train, that they had broken their contract by not taking him on from Doncaster to Barnsley.

*Phipson*, on the part of the appellants (the defendants below) submitted—first, that the company had the option of taking the plaintiff by any train they thought fit; and, secondly, that they were not bound to carry him on to Barnsley, because the ticket referred him to the advertised trains, from which he might have seen that the train ran from Doncaster to Barnsley on a Sunday.

*Hall*, for the respondent (the plaintiff below), was not called upon.

PATTESON, J.—I am of opinion that the judgment of the Court below must be confirmed. The advertisements referred to say nothing about the time of arrival beyond Doncaster; but they clearly refer to the Doncaster trains as the mode of returning to Barnsley. If there had been an advertisement specifying at what times the Doncaster trains were to be met by the Barnsley trains, *Phipson's* argument might have been good, but that is not so; and I think, moreover, that by this contract the plaintiff had the option to say by what train he would go. Here the plaintiff wished to go by the morning train, but the defendants very properly, although unfortunately for themselves, refused to take him by it, as it would have been dangerous to put on any more carriages; they did not carry him on to Barnsley by the evening train, and therefore he was entitled to recover against them.

WIGHTMAN, J.—I am of the same opinion. Even if the plaintiff had waived his right to go by the morning train, at least he ought to have been carried on to Barnsley when he went by the evening train.

*Judgment affirmed.*

## COURT OF QUEEN'S BENCH.

## COUNTY COURT APPEAL.

*February 11, 1852.*

(Before PATTESON and WIGHTMAN, JJ.)

WEAVER, App., v. FLOYD, Resp.

*Truck Act 1 & 2 Will. 4, c. 37—Artificer and workman, or sub-contractor.*

*man employed and working as a collier in a coal mine, dismissible at month's notice, and paid at a certain rate per ton of coals got by him, but not bound to work any fixed number of hours, and being at liberty to employ men to assist him, is an artificer or workman within the meaning of the Truck Act, and his wages must be paid in money, not in goods, if by the contract he is bound to give his personal labour in the performance of the work.*

THIS was an appeal from the County Court of Monmouthshire, held at Tredegar, and the case stated by the judge for the opinion of the court above was as follows:—This is an action brought to recover the sum of 38*l.* 11*s.* 5*d.* for wages. The defendant is a contractor under the Tredegar Iron Company, for the mining of coal and iron, and resides at Tredegar, in the county of Monmouth. About the 30th of May, 1850, he employed the plaintiff to work in what is called a stall in a coalpit belonging to the company at the following rates, viz.:—9*s.* 8*d.* a dozen for iron ore, 1*s.* 9½*d.* per ton for large coal, and 1*s.* 2½*d.* for mixed coal; the plaintiff forthwith entered upon his work, and continued working thereunder till the month of August last. The workings of the coal mine consist of the main roads leading into the work and the workings, whence the chief part of the coal is worked. The main roads are called "headings," the side workings "stalls." During the period of his employment, the plaintiff earned altogether the sum of 58*l.* 13*s.* 2*d.*, and he received 20*l.* 1*s.* 9*d.* in cash; a balance, amounting to 38*l.* 11*s.* 5*d.*, was received in goods, on the credit of the defendant at a shop kept by Mr. Fothergill, the profits of which shop the Tredegar Iron Company have an interest, in the shape of a percentage on the business done; and that balance formed the subject of this action. The defendant gave notice of set-off for the whole amount of such goods; and the plaintiff contended that the defendant was not entitled to deduct,

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as a set-off, the price of such goods from his wages. In agreement, the plaintiff was entitled to be paid monthly draw money on account at the end of every week. On the night after the plaintiff went to work he asked the defendant for 5s. in cash, and the defendant gave him an order for 5s. to Mr. John Davies, the bookkeeper at Mr. Fothergill's shop. The amount of this order he received in goods at the shop. Following Saturday he received 3s. as "draw," that is, a sum of money on account; and, on the following Monday morning, he asked the defendant to put orders in the shop; and, from that time till the termination of his engagement, orders were regularly put in every week on his account, proportionate to the amount of his estimated earnings, and he received the amount of such orders from time to time, as they were put in, in goods. The defendant had a pass-book from the shopkeeper, in which the value of the goods were entered as so much "cash." The goods specified, nor any particulars given. The entries say,—10, cash, 5s.; December 15, cash, 4s. 3d., and so on. The plaintiff received his monthly pay, a statement of the account between the plaintiff and the defendant, delivered to the plaintiff; this statement, which is called a "draw ticket," credits the plaintiff with the amount of his earnings for the past month, and debits him with the money paid him with the amount of the orders put into the shop, which are entered as cash advanced, and with the usual charges for fuel, &c.; and the balance, if in his favour, was paid him in cash, and if against him, was carried to his debit in the next month's account; and, during the period of his contract, it was so on one side, and sometimes on the other; but more frequently the balance was against the plaintiff. The plaintiff, in his statement, stated that he frequently expressed dissatisfaction at being paid in this manner, and that he went to the shop under compulsion of the defendant, on the other hand, deposed that it was in accordance with the plaintiff's express request that the orders were put into the shop; that he was perfectly at liberty to deal where he pleased, and that he had been told if he would do without cash he should regularly have 10s. a week as draw; and, in corroboration of this statement, it was shown that several men in the defendant's employ were paid the amount of their wages in cash, and that the defendant put no orders in the shop on their accounts, but always paid them in cash; and two of the men who swore that they had heard the plaintiff ask the defendant for cash on the shop. The defendant has no interest in the shop, and derives no benefit either directly or indirectly from the shop, which he puts in on account of the men in his employ. The defendant, however, was a contractor under the Tredegar Iron Company, and it was proved that the Tredegar Iron Company derived from Mr. Fothergill, the owner of the shop a per-centage on the business of the shop, which included the goods delivered to the plaintiff. Mr. Fothergill was paid for these goods by the Tredegar Iron Company, and not by the defendant, the Tredegar Iron

at the time deducting their per-centage, and the Tredegar Company only paid the defendant the cash balance which was o the plaintiff, after deducting the value of the goods. This proved to be the course of proceeding with regard to a large er of workmen besides the plaintiff. The plaintiff was not, e terms of the agreement, bound to work any stated number urs, or to do any fixed amount of work, and he was at liberty ploy men to assist him, if he thought proper to do so; and dingly he did employ, during four months of his service, one and during one month two men, who were paid their wages e plaintiff in a similar manner, that is to say, by orders on op put in by the defendant in the plaintiff's name. The iff was a working collier, working personally during the time of his service in the same way as other colliers in the t are in the habit of working. He was subject to be dis- l or to leave his service on a month's notice, and his service etermined by a month's notice given on the 22nd July last. half of the plaintiff it was contended that this mode of settling the plaintiff for his wages was altogether illegal and void

the Truck Act, and that he was entitled to recover the t of wages which he had received in goods. On behalf : defendant it was contended, first, that the plaintiff was not tificer within the meaning of the 1 & 2 Will. 4, c. 37, he g taken a piece of work called a "stall" to get coals by the and iron mine by the dozen, and having command of his own nd by reason of his employing men under him who were paid : plaintiff in the same manner as the defendant paid him; at, therefore, he was a sub-contractor. Secondly. That at the he contract was made between the plaintiff and the defen- t was agreed that the plaintiff should be paid in weekly r draws and monthly settlements; that the orders having out in for the plaintiff before there was anything due to him his contract, this was not a payment of goods in lieu of , as the wages must be earned and payable at the time such were delivered, to bring it within the operation of the act. ly. That the defendant, having no interest in the shop, and g rendered himself liable for the amount of the goods supplied plaintiff, was entitled to set off the amount as money paid plaintiff's request, and was not precluded from setting off the t by sect. 5; and, fourthly, that the plaintiff was now pre- l from disturbing the settlement which had taken place from : to month between them, by reason of his acquiescence n, the plaintiff never having disputed the monthly accounts had been delivered to him by the defendant before ac- brought. The case having been tried before the judge of ounty Court, without the assistance of a jury, the judge first, that the plaintiff was an artificer within the meaning of t; and, secondly, that the delivery of the goods so supplied : plaintiff was payment, and not matter of set-off; and that yment having been made in goods, and not in the current

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coin of the realm, was illegal, null, and void; and gave the plaintiff judgment for the whole amount claimed. The question, then, for the Court of Queen's Bench is, is the receipt of goods by the plaintiff, under the circumstances above stated, available as a defence to this action, either as payment or matter of set-off?

*Watson*, for the appellant (the defendant below.)—The question turns upon 1 & 2 Will. 4, c. 37, which requires that workmen and artificers in certain trades shall not be paid otherwise than in the current coin of the realm; but the plaintiff was not a workman or artificer within that act. He was a kind of sub-contractor, as in *Riley v. Warden* (2 Ex. 59), where the plaintiff was held not to be a workman within the act. [PATTESON, J.—The contract there was very different from this. It was a contract to execute a particular work, which the plaintiff could not perform by his own labour alone; and he was not dismissible, as here.] The plaintiff sues here for the work of others as well as his own work; and the contract is clearly not one for mere personal service, he refers to the 1st, 3rd, 19th, and 25th sections of the act.

*Keating*, contra, was not called upon.

PATTESON, J.—This would be like the case of *Riley v. Warden*, unless, by the contract, the plaintiff was to work personally; if the judge had that case before him, he must have come to the same conclusion in point of fact. The plaintiff was to be paid so much per ton; but that would not alter the case if the contract was for personal service; and I see nothing inconsistent with that view of the case. If it was a contract for personal service, the statute applies; if it was not, but a contract to work a portion of the work by the labour of others, then it does not apply. The agreement was not very satisfactorily stated; but the judge must have proceeded upon the ground that it was a contract for personal service.

WIGHTMAN, J.—I am of the same opinion. It is impossible to say upon this case that the judge has wrongly decided. The plaintiff was to be at liberty to employ men to assist him; and he was to be paid at so much per ton; but that is not inconsistent with a contract for personal service; and the provisions of the wholesome statute cannot be evaded by adopting any partial mode of paying the workman's wages. This case does not appear to fall within the rule stated in *Riley v. Warden*, because there the plaintiff was really a sub-contractor, who might have performed his contract altogether by the labour of others. The object of the statute was certainly to protect those who contracted for personal labour; and the plaintiff here appears to have done so.

*Judgment affirmed with costs.*

## COURT OF COMMON BENCH.

*April 22, 1852.*

HAYES v. KEENE.

*Detention of prisoner after expiration of warrant of commitment—  
Demurrer—Construction of Rule 131.*

131st rule of the "Practice and Proceedings of the County Courts" directs that "Warrants for commitment, whenever issued, shall bear date on the day on which the order for commitment was made, and shall continue in force for three calendar months from such date, and no longer." A debtor having judgment against him in a County Court, and an order made on him to pay the debt and costs by instalments, made default, whereupon a judgment-summons was issued, and, on his non-appearance thereto, a warrant of commitment was issued against him. The warrant authorized the arrest of the debtor, and his commitment to prison "for the term of ten days from the date of the warrant." The warrant bore date on the 19th of September, 1851, and on the 16th of December following the debtor was arrested and delivered into the custody of the keeper of the prison to whom it was directed, who detained the debtor until the 25th of the same month, being ten days beyond the three months during which the warrant was to be of full force and effect.

The debtor brought his action of trespass against the gaoler for assault and false imprisonment, and the latter pleaded a justification under the warrant. To this plea the plaintiff replied that the warrant, by the 131st rule of the "Practice and Proceedings of the County Courts," was to continue in force three calendar months, and no longer, and that although he was arrested within that period, and was imprisoned for a longer period than ten days, yet he was unlawfully detained in prison ten days beyond the three calendar months during which the warrant was to run:

On general demurrer, that the replication was no answer to the plea; for that, although the warrant was to remain in force only three months from the date of the order of commitment, the debtor, having been arrested within that period, was to be imprisoned for the number of days specified in the warrant, notwithstanding the three months during which it had force were expired before the debtor had completed the term of imprisonment which the County Court judge had ordered.

TRESPASS for assault and false imprisonment. The declaration stated that on the 16th of December, 1851, the defendant arrested the plaintiff, and seized and laid hold of the plaintiff and imprisoned him in a certain gaol or prison for ten days then next

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—  
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tion of—Con-  
struction of rule.*

following, contrary to law, and against the will of the  
whereby, &c.

The defendant pleaded that before the committing of the  
trespasses in the declaration mentioned, and after the passing  
9 & 10 Vict. c. 95, to wit, on, &c., a County Court of  
County Court of Surrey was duly constituted to be holden  
Wandsworth, in the said county, and from thence hitherto  
been duly holden there under the said act of Parliament; and  
the constitution of the court, and before the trespasses  
declaration mentioned, to wit, on, &c., one Peter Plumbe  
being the clerk of the said court, duly issued under the  
of the said court a warrant of commitment, intituled—"County  
Court of Surrey, holden at Wandsworth, between  
Rosling, plaintiff, and William Hayes, defendant," and directed  
the high bailiff and others the bailiffs of the said court, and  
governor or keeper of the common gaol at Horsemonger-lane,  
which said warrant, after reciting that at a court holden at  
Wandsworth on the 2nd of May, 1850, the said Alfred Rosling  
judgment of the said court in a certain suit wherein the said  
had jurisdiction, recovered against the now plaintiff the  
6*l*. 17*s*. 1*d*. for his the said Alfred Rosling's debt, and  
of 2*l*. 3*s*. 1*d*. the costs of the said suit, amounting to  
9*l*. 0*s*. 2*d*., and that, therefore, it was then and there ordered  
the now plaintiff should pay to the clerk of the said court  
Wandsworth the said sum of 9*l*. 0*s*. 2*d*., by instalments of  
of 8*s*. every four weeks; and reciting that the now plaintiff  
having paid the same pursuant to the said order, a summons was  
application of the said Alfred Rosling, duly issued from  
the said court against the now plaintiff, by which summons  
required to appear at the said County Court holden at Wandsworth  
on the 6th of March, 1851, to answer such questions as might  
to him touching his estate and effects, and the manner and  
stances under which he contracted the said debt, and as to the  
means and expectations he then had, and as to the proper  
means he still had, of discharging the said debt, and as to  
disposal he had made of any property; and reciting that the  
duly proved on oath at the said mentioned court, that the  
plaintiff was personally served with the said summons; and  
that the now plaintiff did not attend as required by such summons  
or allege any sufficient excuse for not so attending; and that  
it was ordered by the judge of the said court that the now plaintiff  
should be committed for the term of ten days to the common  
at Horsemonger-lane, in the said county of Surrey, according  
the form of the statute in such case made and provided, and  
he should be discharged by due course of law, the said high  
bailiffs, and others, were thereby required to take the now plaintiff  
and deliver him to the governor or keeper of the common  
gaol at Horsemonger-lane, and the said governor or keeper was  
required to receive the now plaintiff, and him safely keep  
the said gaol for the term of ten days from the arrest under the



unt, or until he should sooner be discharged by due course of law for which that warrant should be a sufficient warrant to the high bailiff, bailiffs, and others, and to the governor and keeper of the said common gaol, which said warrant bears date, to wit, 9th September, 1851, and was duly signed and sealed, which said warrant afterwards, whilst the same was in force, and before the sitting of the said trespasses, &c., to wit, &c., was delivered by the said clerk to one William Goff, then being one of the bailiffs of the said court, to be executed in due form of law, by virtue of the said warrant afterwards, and before three calendar months from the date thereof, &c., and before committing, &c., and whilst the said warrant was in force, to wit, on the 16th December, 1851, the said William Goff, &c., did then, within the jurisdiction of the said court, take and arrest the now plaintiff by his body, and did forthwith convey him to the said common gaol at Horsemonger-lane and did then, under and by virtue of the said warrant, deliver the now plaintiff to the defendant, who then was, and still is, the now plaintiff's gaol and keeper of the said gaol, and the defendant did then receive the now plaintiff into the said gaol into his custody, as such gaol and keeper; and the defendant further says, that he received the now plaintiff into the said common gaol, under and by virtue of the said warrant, safely kept and detained the now plaintiff in prison in the said common gaol from the time when he received the now plaintiff into the said common gaol as said, until he, the now plaintiff, was discharged from prison in the due course of law, to wit, for the said time in the declaration mentioned, as the defendant lawfully might for the cause aforesaid, which are the said several trespasses in the declaration mentioned, &c.

Application.—That after the passing of the County Courts Amendment Act (12 & 13 Vict. c. 101, s. 12), and before the issuing of the warrant in the said plea mentioned, to wit, on the 14th February, 1850, Charles Lord Cottenham then being Lord Chancellor, duly authorized and appointed five judges of the County Courts to frame such general rules and orders as to them should seem expedient for and concerning the practice and proceedings of the County Courts, and for the execution of the process of such courts, &c., which said judges afterwards, before the issuing of the said warrant under and in pursuance of the said appointment and authority, framed divers general rules and orders; and, amongst others, the following general rule and order (rule 131), that is to say:—"Warrants of commitment, whenever issued, shall bear date on the day on which the order of commitment was made, and shall continue in force for three calendar months, and no longer, but no order for commitment shall be drawn up or served," which said rule or order was afterwards duly certified to Thomas Lord Truro, then being Lord Chancellor, under the hands of the said five judges, and was then submitted by the Lord Chancellor to three of the judges of the Superior Courts of Common Law, which said three judges then

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struction of rule.

approved of the said rule, and the said rule was forthwith laid before the two Houses of Parliament, and became of the force of law. And the plaintiff further said that, although he was arrested under the said warrant within three calendar months from the date thereof, to wit, on the 16th December, 1851, and was imprisoned under colour thereof by the defendant for a term not exceeding ten days from the said arrest, to wit, until the 25th day of December, in the year aforesaid, yet the defendant imprisoned the plaintiff and detained him in prison in the said gaol and prison under and by colour of the said warrant after the expiration of three calendar months from the date thereof, to wit, from and after the 19th day of December, until and upon the 25th day of December, in the year last aforesaid, which is the imprisonment and trespass in the declaration mentioned, &c.

To this replication the defendant demurred generally.

Joinder in demurrer.

At the foot of the warrant, set out above in the plea, there was this notice:—"N.B. This warrant remains in force for three calendar months from the date thereof."

Channell, Serjt., and D. T. Evans, in support of the demurrer, contended that as the plaintiff was arrested and received by defendant into gaol under the warrant within three calendar months from the date of the warrant, the defendant was thereby justified as keeper of the prison, acting under the warrant, in keeping the plaintiff in prison for the space of ten days, being the term of imprisonment mentioned in the warrant, notwithstanding three calendar months from the date of the warrant as limited by rule 131 of the Rules and Orders concerning the Practice and Proceedings of the County Courts, had expired before the term of the plaintiff's imprisonment mentioned in the warrant—that is to say before the ten days' imprisonment had expired.

JERVIS, C. J.—Have we not considered this case on *habeas corpus*?

Giffard.—No.

JERVIS, C. J.—There was a case in which a similar question was raised; I mean *Re O'Neill*, ante 484.

CRESSWELL, J.—What plaintiff has to contend for is very much like saying that after the expiration of a writ of summons the cause is at an end.

Giffard, in support of the replication.—It is submitted that judgment on this demurrer should go for the plaintiff. The rule set out in the replication is both clear and explicit. It provides that the warrant of commitment shall be of force and effect for three calendar months, from the date of the order of commitment, and no longer. Here the justification is that defendant was detained by a warrant, the force of which had expired; for he was detained seven days after expiration of three months from the day on which the order of commitment was made. The warrant is not only the warrant for capture, but also the warrant for detention; and its force, under the rule recited, had expired before the discharge of

plaintiff from prison. [WILLIAMS, J.—The warrant of detention and that of commitment are different.] Not in this case. The authority the keeper of the gaol has is the judge's warrant of commitment, which also is the warrant of detainer. [CRESSWELL, J.—In your view of the point, the man, though taken only three days before the expiration of the warrant, cannot be imprisoned for a second warrant directed by the judge, except by fresh warrant.] The warrant might have gone to the judge under the 135th rule for a second warrant. [CRESSWELL, J.—How can you have a second warrant of commitment, the first having expired?] If the judge can grant successive warrants. [JERVIS, C.J.—Yes; it is for a fresh offence: a manifest absurdity follows the argument that the man is held by reason of the judgment, and the purpose of the warrant is to apprise the gaoler of the judgment and subsequent proceedings, and to authorize him to hold.] The only instance in which the gaoler can justify is by the warrant, which is issued before the release of the prisoner. As far as the gaoler is concerned, this is a warrant of detention, and that only; he has nothing to do with the capture of the plaintiff; he has only to receive him and detain him during the period in which the warrant of commitment has force. There is but one order or warrant, therefore, serves for the commitment and detainer. [TALBOT, J.—There is the judgment of the County Court.] Yes, my lord. [JERVIS, C.J.—A summons issues, judgment follows, and then the judge issues the warrant.]

The judge says—"Commit the debtor for ten days," which gives the authority for the warrant, and the clerk, acting under the 102nd rule, issues the warrant. [WILLIAMS, J.—You say this is the only authority for detention?] Yes; there is no other, unless the order of the judge, made by the clerk in the court, can be said to be such. [JERVIS, C.J.—What is the authority for commitment under the statute?] It is given in the 102nd rule of 9 & 10 Vict. c. 95. [JERVIS, C.J.—As I understand the rule, it means that the gaoler shall be bound to receive and detain the defendant until the period for which he was committed by effluxion of time, or by *habeas corpus*. There is here no ground for justification.] This case is different from one of *capias*, because these are words imported in this warrant—shall not be of force and effect beyond three months—which does not contain.

[JERVIS, C.J.—I should be very sorry if the court felt constrained by any technical construction to give judgment for the plaintiff on this demurrer, because, in fact, by so doing, the court would be impeding the operation of the County Courts Act, and its decision would necessarily have the effect of obstructing the execution of all warrants where a defendant kept out of the court until the term of the warrant was nearly expired. Either he must not be taken at all, or, if taken, must be discharged without having undergone the term of imprisonment awarded by the County Court.] I am happy, however, to say that, in the opinion of

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struction of rule.*

the court, it is not necessary to adopt that construction. Construing the rule in the strictest way,—namely, that the warrant of commitment should bear date from the day that the order of commitment was made, and should continue in force for three calendar months, and no longer, having received the warrant which directed him to keep the defendant for the term of ten days from the arrest, the gaoler was bound to keep the plaintiff for the term so mentioned in the warrant. Those who made the rule had well considered the necessity of it; and the necessity was, that a party should not obtain a warrant of commitment, and keep it suspended over the head of a defendant for an indefinite period of time, for the purpose of harassment and intimidation, but there is no reason whatever when the warrant was once executed within three calendar months as prescribed by the rule, why the judgment recited in it should not be fully carried out. The defendant, therefore, is entitled to the judgment of the court on this demurrer.

CRESSWELL, J., concurred.

WILLIAMS, J.—I am of the same opinion. I think that the meaning of the 131st rule is, that when once the warrant comes into operation, it is to operate fully as to the terms contained in it. TALFOURD, J., assented.

*Judgment for the defendant.*

## COURT OF COMMON BENCH.

## COUNTY COURT APPEAL.

Before MAULE, WILLIAMS, and TALFOURD, JJ.)

February 24, 1852.

JUSTICE, app., GOSLING and OTHERS, resps.

*and false imprisonment—Arrest by police constable—Conviction for furious driving—2 & 3 Vict. c. 47, ss. 54 and 63.*

*ntiff having been arrested and imprisoned by the defendants, who police constables, on a charge of furious driving, brought an of tort against them in the County Court. At the trial the ff, in opening his case, stated that the defendants had taken him istody, and detained him for some time in a station-house on a and unfounded charge of furious driving, and that on their ce he had been convicted of the offence by two justices of the and fined 20s. For the defendants, it was thereupon objected , that admission the plaintiff had put himself out of court. A f the conviction was put in evidence; the plaintiff admitted he rid the penalty, and had not appealed against the decision of the rates; and the County Court judge, considering that the con- was a conclusive answer to the action, so directed the jury, and ict was accordingly found for the defendants. The judge stated e for this appeal, but it did not show that the plaintiff com- the offence of furious driving within view of the defendants, so ustify the arrest of plaintiff under 2 & 3 Vict. c. 47, s. 54: appeal, that the decision of the County Court judge was wrong, e judgment must be reversed.*

*al, the court will not send back a badly drawn case to be re- but will dismiss the appeal with costs.*

*was an action brought in the County Court of Herts, den at Barnet, before the deputy judge of that court, and ie before this court by appeal from the direction of the the trial of the cause.*

*ase was settled by the deputy judge, the parties themselves able to agree as to the statement of the same. The plain- ght his plaint in the abovementioned County Court against ndants, Gosling, Sumner, and Suriman, for a tort in im into custody and detaining him at the police station at n (as he alleged in his particulars) a false and unfounded*

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charge of furiously driving a horse and gig to the danger of  
gers in the public highway. The plaintiff claimed 25*l*. damage  
cause was tried in the County Court before a jury on the 1  
August, 1851. On the hearing the plaintiff stated that t  
defendants first named arrested him between ten and eleven  
at night on the charge above mentioned; that the char  
false and unfounded; that before they took him into cust  
informed them of his name and residence, gave them his car  
offered to verify his statement by a person in the neighbor  
that the two defendants, notwithstanding, took him into c  
and delivered him to the third defendant, who, at their  
detained him in the police station at Barnet until he gave  
answer the charge; that the charge was afterwards heard  
the magistrates, who convicted him of the offence charged  
him, and fined him 20*s*. Thereupon the attorney for the  
dants insisted that by his statement the plaintiff had put  
out of court. The judge then asked if the defendants coul  
the conviction, on which an examined copy of the followi  
viction was proved and put in by the defendants:—

“Metropolitan Police District and  
of Middlesex, to wit.

“Be it remembered, that on the 28th day of April, A.D.  
Walter Justice, of Bernard-street, within the said metr  
police district and county of Middlesex, solicitor, is brough  
us, James Dickens, Esq., and Charles Herbert Cottrell, E  
of Her Majesty's justices of the peace, for the said county  
dlesex and county of Hertford, sitting at the Barnet  
Sessions Court within the metropolitan police district and  
county of Hertford, and is charged before us with hav  
the 22nd of April, A.D. 1851, at the parish of Finchley,  
said district or county of Middlesex, in the public thoro  
there situate, there and then furiously driven a horse and gi  
such thoroughfare to the common danger of the passengers  
thoroughfare; and it appearing to us, James Dickens, Esq.,  
Charles Herbert Cottrell, Esq., upon the oath of William  
and John Sumner, credible witnesses, that the said Walter  
is guilty of the said offence, we do hereby adjudge the said  
Justice to forfeit and pay for his said offence the penalty of  
shillings, to be applied as the statute in this case made as  
vided directs. Given under our hands the day and ye  
mentioned.

“JAMES DICKENS.

“CHARLES HERBERT COTTRELL

The plaintiff admitted he had paid the penalty so ad  
against him, and had not appealed from the conviction or  
any other steps to impeach its validity. The case conclu  
stating “that thereupon the said deputy judge being of  
that, under the circumstances hereinbefore mentioned, th

was an answer to the plaintiff's claim for damages, Justice, App., the jury to find a verdict for the defendants. The plain- GOSLING AND dissatisfied with the said determination and direction in OTHERS, Resps. w, appeals against the same."

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d, for the plaintiff (the appellant.)—The direction of y Court judge to the jury, that they should find for the e, was manifestly wrong. The judge never allowed go into his case; but the moment evidence of the con- ore magistrates of furious driving was admitted by the ne seemed to think there was an end of the case, and d the jury to find for the defendants. The conviction dmissible in evidence, so as to put the plaintiff out of vas here done. The conviction before magistrates was & 3 Vict. c. 47, ss. 54 and 63. [WILLIAMS, J.—The ; was similar to an ordinary case at Nisi Prius, where directs a nonsuit. MAULE, J.—It comes to this,—the s taken in custody on a charge of furious driving, and before a magistrate, as he says, on a false charge; the hen is, was he ever convicted?] A conviction of an io evidence against a party in a civil action; it is not a pro- tween the same parties. It is also inadmissible, because tion might possibly have gone upon the evidence of the s themselves: (2 Phil. Ev. 23; 520, 8th ed.) Secondly, on for furious driving cannot be evidence where the s not whether plaintiff was furiously driving, but a que- se imprisonment. The conviction, therefore, as regards was wholly irrelevant. Thirdly, if the conviction was ant, and was conclusive as to furious driving, it was not evidence in a question of false imprisonment. Supposing ction exonerated the defendants from punishment for the plaintiff, it would not justify their assaulting the and keeping him in custody for a length of time. The as not allowed to state his case in full, but was cut short lge directing a verdict for defendants. There is nothing ute to justify this arrest. The 2 & 3 Vict. c. 47, autho- e constables to arrest individuals in certain cases, but it protect them in an arbitrary proceeding such as this. By olice constables are authorized to arrest persons who, in are guilty of furious driving in a public thoroughfare; ower is limited by sect. 63, which enables a constable to custody any person committing offences within his view, hat person does not give the constable his true *name* and

In this case the plaintiff gave the police constables his aining both. [MAULE, J.—I observe sect. 54 ap- rticular offences therein specified. If a person commits these within view of the constable, whether he gives not, the constable may take him into custody.] It was efendants to show that they had good cause for im- the plaintiff, and that the offence was committed within

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*Ellis*, interposing.—The case does not anywhere show the offence was not committed within the view of the constable. therefore, cannot enter on that objection. It was not taken court below, and cannot now be entered into on appeal.

*Raymond*.—I reply to that by reference to a case of *Sim Millengen*, 2 C. B. 524. The part of the marginal note material is this:—"In trespass by A. against B. for false imprisonment, B. justified, on the ground of A. having wilfully and w excuse, within view of the constable who apprehended her, an and disturbed the plaintiff and his family by knocking and r at his door. Held, that to support this plea under sects. 5 62 of 2 & 3 Vict. c. 47, it was necessary to prove the offence have been committed within view of the constable." A justification for trespass, where it rests upon a statute, must be followed: (*Matthews v. Biddulph*, 3 M. & G. 390.) On statement of this case as settled by the deputy-judge, it is possible to say how plaintiff opened his case.

MAULE, J.—There is a statement in the case that the judge was of opinion that "under the circumstances mentioned the conviction was an answer to the plaintiff's case. By this the judge must be taken to mean under the circumstances mentioned in the plaintiff's opening.

*Ellis*, for the respondents, was then called on.—The opening of the plaintiff is analogous to a declaration in case for an arrest and taking into custody on a false charge. The burden of proof lay on the plaintiff. [MAULE, J.—The present is a case of trespass for assault and false imprisonment. If you hold of a man and convey him to a police office, that is a trespass and you must justify it.] I rely on sects. 54 and 63 of the statute. The latter clause not only empowers a constable to take into custody persons who commit offences within view, but one suspected of having committed or being about to commit a breach of the peace. In the present case the defendant set out strong reasons for believing that the plaintiff had committed an offence. [MAULE, J.—They did not say so; or, at all events, it is not shown by the statement of the case.] As the case is complete, perhaps the court will allow it to be re-stated.

MAULE, J.—We cannot order that. The decision of the court below must be reversed with costs. There will be a new trial with costs of appeal to the appellant.

*Judgment reversed.*



## COURT OF QUEEN'S BENCH.

May 1, 1852.

## 1. THE CLERK OF THE COUNTY COURT OF SURREY.

*Writ of debt out of court—Execution for costs—Mandamus.*

*A plaintiff who has obtained judgment for debt and costs, in the County Court, and has received from the defendant, out of court, either the whole or part of the debt, is entitled to a warrant of execution for the whole of the debt and the costs, or for the costs alone, as the case may require, though in form the judgment is to pay the money into court; and the Court of Queen's Bench will grant a mandamus to the clerk of the County Court, commanding him to issue such writ of execution.*

In this case a rule had been obtained, calling upon the clerk of the County Court of Surrey to show cause why a writ of execution should not issue directed to him, commanding him to deliver under the seal of the court, a warrant of execution to the plaintiff, to levy the sum of 5*l.* 7*s.* 2*d.* upon the goods of one Meyer, pursuant to sect. 94 of 9 & 10 Vict. c. 95. It appeared by the affidavit that the overseers of Christchurch had obtained judgment against Meyer in the County Court for 10*l.* debt, and 5*l.* 7*s.* 2*d.* costs. The judgment was in that form requiring the defendant to pay the amount into court, instead of so doing, the defendant paid to the plaintiff out of court, and the plaintiff received the sum of 34*l.* 10*s.* 10*d.* The costs, however, were not paid, and the plaintiffs applied, first to the clerk and then to the judge of the court, for a writ of execution to levy the costs only; but they thought that, under the County Courts Acts and the rules framed thereunder, they had, in the circumstances, no power to issue execution for the

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*well, and C. Clark, showed cause.—The difficulty in this case arises from the payment having taken place out of court, and not contemplated by the statute. The Legislature clearly intended these courts to be self-supporting, and the different steps of the proceedings are to be conducted through the intervention of the court, and upon payment of certain fees. Consequently there is no provision for issuing execution for a part under circumstances such as exist in this case. There may be a partial execution where the debt is made payable by instalments (sect. 95); and there is*

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also a remedy upon any unsatisfied judgment by what is the judgment summons under sect. 98 of the first act; but the authority given by the act to issue the warrant of execution less than the whole amount ordered to be paid: (sect. 94.) warrant was issued for less, there would appear upon the proceedings in court no satisfaction of the judgment; because payment out of court would never be recorded in any way. There would have been no security against the plaintiff claiming future time the sum received. [WIGHTMAN, J.—My Lord, the plaintiff apply and get an order for costs only, under 100?] That section applies only to cases where there has been nonpayment under an order. It does not provide for execution. If there were any ground for this application, it should be against the judge himself, and not against the clerk. (They refer to ss. 109, 110; 12 & 13 Vict. c. 101, s. 7; *Webber v. I* 8 M. & W. 319; and to the rules (cxix. to cxxiv.) and the proceedings sanctioned by the judges.

*Brewer, contra.*—One of the forms is applicable to the case of residue remaining unpaid; and unless there can be partition in a case like this, the plaintiff has no remedy.

*Cur. adv.*

#### JUDGMENT.

*Judgment.*

LORD CAMPBELL, C. J., now delivered the judgment of the court. (a)—Upon this rule a question has been raised—an important question—whether a plaintiff who has recovered judgment in a County Court for debt and costs, and has received the debt out of the court, is entitled to a writ of execution for the costs. For the defendant it was contended, that according to the statute and the form of judgment, and the rules and practice of the County Court, the whole of the sum recovered ought to be paid into court, or to the officer of the court, and if the plaintiff received any part himself, he lost the right to an execution for the residue. But we find nothing in the statute or the rules to support this view. Provisions are made in both for execution after part satisfaction (see section 95 of the act, at ss. 120, 121, and 122),—and no provision is found prohibiting a plaintiff from receiving satisfaction without the intervention of the court. The order to the defendant, in the form of the judgment, is that he pay the money into court, or to the officer of the court, and for the benefit of the plaintiff. The defendant, if he chooses to adopt that mode of payment. The defendant further alleges that the Legislature intended to save the sufficiency of fees for the support of the County Courts, at the bringing of all moneys recovered into court is important for this purpose. This part of the argument seemed to indicate that the County Courts were instituted merely as machines for getting costs, and raising revenue for the Chancellor of the Exchequer. But we think that there was not any intention to create a new mode of costs. Plaintiffs generally in our courts are entitled to pro-

(a) Lord Campbell, C. J., Wightman, Erle, and Crompton, JJ.

their suits as they choose, and we see no reason for con-  
 sidering County Courts to stand in a different situation in this  
 than the other tribunals of the country. It is obvious that  
 the Court's power of settling with the defendant without an  
 order may be the means of saving expense; by so settling for  
 costs the Court does not, in our judgment, incur any incapacity in  
 obtaining execution for the remainder. As the judge,  
 having declined to order a writ, we think the rule against  
 costs ought not to be drawn up, if within a week he issues the  
 writ as prayed, otherwise the rule will be absolute. I wish  
 to be understood that it is our clear opinion that if the whole of  
 the debt has been paid there may be execution for the costs, and if  
 only part has been paid there may be execution for the residue and  
 costs.

*Rule absolute, unless execution issued.*

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## COURT OF QUEEN'S BENCH.

## COUNTY COURT APPEAL.

*May 10, 1852.*

THE GREAT NORTHERN RAILWAY COMPANY, app.,  
MORVILLE, resp.

*Carrier—Liability for negligence—Notice—Special contract—  
Carriers' Act.*

*A common carrier for hire received a horse to be conveyed from A. to B. At the time of the receipt of the horse, the owner was required to take a ticket, which, after stating the amount paid for the conveyance of the horse and the termini of the journey, contained the following words: "This ticket is issued, subject to the owner's undertaking to bear the risk of injury by conveyance and other contingencies; and the owner is required to see to the efficiency of the carriage before he allows his horses or live stock to be placed therein. The charge being for the use of the carriages and locomotive power only, the company will not be responsible for any alleged defects in their carriages, unless complaint be made at the time of booking, &c., nor for any damage, however caused, to horses, cattle, or live stock of any description travelling upon the railway, &c. I have examined the carriages, and am satisfied with their sufficiency, and safety." Then followed the signature of the owner:*

*Held, that this was not a mere notice which would be void under sect. 1, but a special contract within the 6th section of the Carriers' Act (11 Geo. 4 & 1 Will. 4, c. 68), and protected the carrier from liability for damage done to the horse through his negligence in the course of its journey.*

THIS was an appeal from the County Court of Yorkshire, holden at Pontefract. The following case was stated for the opinion of the court:—

This is an action brought to recover the sum of 27*l.*, the amount of damages alleged to have been sustained by the plaintiff in consequence of the negligence and carelessness of the defendants' servants, whereby the plaintiff's horse was injured. On the trial of the cause in the said County Court on Tuesday, the 25th day of November last, before the judge of the court, without a jury, the following facts appeared in evidence:—

The plaintiff is a veterinary surgeon and dealer in horses, residing at Wakefield, and the defendants are common carriers

by for hire, from (among other places) Hirkstead, in the Lincoln, to Wakefield, in the county of York.

On the 14th day of August, 1851, the plaintiff, who had been at the Newcastle horse fair, brought a horse which he had there, to the Hirkstead station of the Great Northern Railway, for the purpose of having it conveyed from thence by the Great Northern Railway to Wakefield, and on the arrival of the down train from Wakefield, it was safely placed and tied up in a horse-box. The plaintiff then went into the company's office and paid the charge for the carriage of the horse to Wakefield, and upon receipt signed in a book kept by the clerk at the station, a receipt or ticket, an exact copy of which is annexed to this judgment, is marked with the letter A. The clerk then handed to the plaintiff what he (the plaintiff) understood to be a duplicate of the receipt signed by him in the book, but which does not contain in italics relating to the sufficiency of the carriages. The receipt hereunto annexed, is an exact copy of the ticket so given to the plaintiff.

On the arrival of the train at Knottingley, the horse-box, containing the plaintiff's horse within it, was detached from the London line and shunted upon the Wakefield line by the servants of the Great Northern Railway, in order to be attached to another train proceeding to Wakefield, and in so doing a concussion took place between the horse-box and a truck or carriage on the latter line, which caused the horse to fall, which, on the arrival of the horse at Wakefield, it was found to have sustained.

The counsel for the defendants contended that the accident had been caused either from gross negligence or misfeasance on the part of the servants, and that the ticket signed by the plaintiff was a contract entered into by him, disclosing the precise terms on which the defendants undertook to convey the plaintiff's horse, and that it was a bar to the plaintiff's recovering in the event of an accident. He cited amongst other cases in support of his position, *The Manchester, Sheffield, and Lincolnshire Railway*, 20 L. J. R., N. S., 440, Q. B.; and *Chippendale v. The Great Northern and Yorkshire Railway Company*, 21 L. J. R., N. S., 440, Q. B.

The plaintiff's attorney contended that the ticket above mentioned was only a special contract as to the sufficiency and safety of the carriage or horse-box, and that the preceding paragraph did not amount to a contract, and was not in effect any contract or agreement between the plaintiff and defendants, but was a mere restriction of the common law liability of the defendants, and as such was void under the 4th section of the stat. & 1 Will. 4, c. 68. The judge took time to consider his judgment, and on the 20th of January last, at Pontefract, gave judgment in favour of the plaintiff, ordering the verdict to be entered for him, and assessing the damages at 21*l.*; but the judge found that the injury done to the horse had not been caused by any misfeasance, wilful misconduct, or gross negligence on the part of the defendants or their servants, but was the result

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of the want of due care only in shunting the horse-box at Lingley, as above stated. The question for the opinion of the Court of Queen's Bench is, whether the defendants upon the construction of the said ticket signed by the plaintiff as above mentioned upon the finding of the said County Court judge, are prot from their liability to pay the damage occasioned as above stated.

The following is a copy of the ticket mentioned in the case marked A. The ticket marked B. was substantially a duplicate that marked A., except that it did not contain the last paragraph. "I have examined the carriages," &c. :—

"The Great Northern and East Lincolnshire Railway Company.

"Ticket for horses, cattle, sheep, pigs, dogs, and live stock of every description.

"No. 71.

Date.

August 15, 1852.

"From Hirkstead to Wakefield.

|         |     |     |    |   |    |    |
|---------|-----|-----|----|---|----|----|
|         |     |     |    | £ | s. | d. |
| 1 Horse | ... | ... | at | 0 | 19 |    |
| Cattle  | ... | ... | at |   |    |    |
| ...     | ... | ... | at |   |    |    |

P

"This ticket is issued subject to the owner's undertaking that all the risk of injury by conveyance and other contingencies the owner is required to see to the efficiency of the carriage he allows his horses or live stock to be placed therein; the carriage being for the use of the railway carriages and locomotive only, the company will not be responsible for any alleged defect in their carriages or trucks, unless complaint be made at the time of booking, or before the same leaves the station; nor for any damage however caused, to horses, cattle, or live stock of any description travelling upon their railway, or in their vehicles.

"I have examined the carriages, and am satisfied with their condition and safety:

"(Signed)

JOHN MORVILLE,

"Owner, or on the owner's behalf.

*Phipson*, for the appellants (the defendants below), contended that the ticket signed by the plaintiff constituted a special contract and therefore fell under the 6th, and not under the 4th section of the Carriers' Act. By the 4th section no mere public notice given by carriers can limit their liability; but the 6th section provides that that act is not to affect any special agreement made between the parties. A mere notice would not require the plaintiff's assent; but the company required that in order to constitute a special agreement, and the terms of it clearly exempt them from liability for the loss of which the plaintiff complains. This question was before the Court of Exchequer on Saturday, and that Court held, that a ticket thus signed constituted a special contract.

d *Shaw v. The York and North Midland Railway Company* (L. 181, Q. B.), and the cases above mentioned.

ing, contra, contended that this ticket was not a contract of the parties, but a mere notice, and that the plaintiff's case was required as an acknowledgment that he had received the ticket, so as to dispense with proof, which would otherwise be required. In the Court of Exchequer, on Saturday, Platt, B., dissenting from the judgment in the case of *Carr v. The Lancashire and Yorkshire Railway Company* (19 L. T. 124), and it is submitted that the judgment cannot be sustained, if the facts were the same as in the present case.

RIDGE, J.—I am of opinion that the judgment of the judge of the County Court in this case was wrong. It appears to me, that the ticket was not a mere notice, but a contract, and was, therefore, not within the 4th, but was within the 6th section of the 1847 Act. As a mere notice the plaintiff would have been bound by it when it was shown him, without signing it; but the company wished to make it more than a notice, and, therefore, required to sign it. He did sign it, and then it became a contract, and by the very extensive terms introduced into it, the plaintiff is protected from liability.

MR. J., concurred.

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*Judgment reversed.*

## COURT OF QUEEN'S BENCH.

## COUNTY COURT APPEAL.

May 10, 1852.

OLDING v. SMITH.

*Truck Act—Payment in current coin of the realm—Evasion of—Pay-office adjoining shop—Intimidation—Evidence to employer.*

*In an action for wages, by a collier, it was proved that he had received the amount due to him, in the current coin of the realm, at a pay-office adjoining a shop kept by his employers (a joint-stock iron colliery) for the sale of goods to their own workmen, and other people; that he had spent the money in the master's shop immediately on receipt of it. In order to show that he had dealt at the shop under compulsion, evidence was offered of a conversation between the plaintiff and the overlooker under whom he worked. The overlooker admitted authority to employ or dismiss the men under him, which was in the office of the coal agent, but he stated that he had received a paper from the clerk in the office of the coal agent, whose principal duty was to ascertain the amount of work done by the men, containing a list of names of persons whom he was to remember as not dealing at the shop, and that the paper contained the plaintiff's name, and that he produced it at the time of the conversation above mentioned. In that conversation the overlooker threatened the plaintiff with his employers' displeasure if he did not deal more largely at the shop:*

*Held, that that statement was not admissible in evidence against the plaintiff's employers:*

*Quære, if the evidence had been admissible, whether it would have affected subsequent payments of money spent at the shop in contravention to the Truck Act.*

UPON appeal from the decision of the judge of the County Court of Monmouthshire holden at Tredegar, the judge stated the following case:—

This action is brought to recover the sum of 39*l.* 19*s.* 3*d.* balance of wages due to the plaintiff from the Rhymney Iron Company for cutting coal. The defendant is the chairman and one of the directors of that company. The plaintiff has been a collier in the employ of that company for several years down to the month of November last. The particulars of demand embrace a p



ending back from November, 1851, to the month of January, 50; during that time it was admitted on both sides that the intiff had earned altogether the sum of 64*l*. 15*s*. 9*d*., and that he l received of this amount the sum of 24*l*. 16*s*. 6*d*., either in cash one of the company's pay offices, or in the ordinary monthly ppages for doctor and fund, and such like. The remaining sum 39*l*. 19*s*. 3*d*. was the amount in dispute, the plaintiff contending t the payment to him of this sum of 39*l*. 19*s*. 3*d*. was a pay-at in goods and not in cash, and therefore void under the act of 1 & 2 Will. 4, c. 37, commonly called the Truck Act. [The section of that act was set out in the case.]

The Rhymney Iron Company is a joint-stock company, having a works at Rhymney, in Monmouth, where they employ about 100 colliers, miners, and other workmen. They have an office re at which the general business of the works is transacted, the ounts kept, and wages paid, which is hereinafter referred to ler the name of "the company's monthly pay-office," and the hier at such office is hereinafter referred to as "the company's hier."

There is a general shop at the works which is kept by Mr. chan, in partnership with the Rhymney Iron Company, under firm of Andrew Buchan and Co.; adjoining this shop is an e where a portion of the workmen are paid their advances by Brew Buchan and Co., under orders from the Rhymney Iron any in the manner hereinafter mentioned, and which is anafter referred to as the pay-office adjoining the shop of Brew Buchan and Co. The cashier employed there was, during period comprised in the plaintiff's account, employed by Brew Buchan and Co., and is hereinafter referred to as "the hier in the office adjoining the shop." This office is divided in the shop, and though having an internal communication with shop, has a different outer entrance, so that persons having iness there, and also at the shop, must go out into the thorough- d in passing from one to the other. The colliers employed in a pit or level, work under the superintendence of an overman or ger, who acts under the directions of the coal agent, and has hing to do of his own authority with the hiring or discharge of colliers, nor with the payment of their wages, or even calcu- ng the amount of them. It is the province of the coal clerk to tain the amount of each man's earnings, which he does from weigher's daily account of the quantity of coal cut by the party, from the overman's monthly account of "dead work" done by , by which is meant the opening of stalls and headings, and r works necessary to the getting of coal, but not the cutting e coal itself.

he duty of the overman is to overlook the colliers, and see that work is properly performed. He reports any instance of mis- duct, and discharges the offending parties when authorized he coal agent, and conveys requests to the coal agent or clerk, when any men are desirous of having advances on

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account of their current earnings out of the usual course. In instances the overman informs the coal agent, or the coal agent informs the party, about how much "dead work" the party is entitled to be paid for before it is actually measured, and the coal agent decides whether an advance shall be made or not.

The system of payment which the company adopts is as follows:—The workmen in their employ are settled with monthly by the company's monthly pay-office, up to the last Saturday of each month, when a pay ticket is delivered to each workman, showing him with the amount of his earnings during the month, debiting him with the balance due from him at the preceding monthly settlement (if any) with the cash advanced at both payments during the month, and with the amount of the usual stoppages. A balance is struck at the foot of the pay ticket, which, if against the workman, is carried to the debit of his month's account, and if in his favour, is paid him in cash. At the monthly settlement, the workman is allowed to draw at the end of every week such an amount as the coal clerk estimates, having regard to the estimated amount of his earnings during the week, and which he enters in a book kept at the company's pay-office, where such draw is also paid in cash. Besides the weekly payments, advances are also made on account of wages at the pay-office, adjoining the shop of Andrew Buchan and Co., in the following manner:—The coal clerk makes up every week a book called the "Advance Book," in which is entered, against each workman's name, a certain sum calculated by reference to his earnings, and which book is carried down to the cashier's office adjoining the shop of Andrew Buchan and Co., as a security for the payment of the said advances. The workman has liberty to draw the amount of the orders entered in the book in cash, without having any dealing whatever with the shop for goods; and it was shown that the cashier in the office of the shop of Andrew Buchan and Co. had paid, during the months ending June 1851, an average per month of 280*l.* to the workmen in the company's employ, no part of which was paid at the shop. The plaintiff had in this way received numerous sums, amounting to 1*l.* 9*s.*, forming part of the above-mentioned claim of 39*l.* 19*s.* 3*d.*, and expended the remaining part of the sum in goods at the shop of Andrew Buchan and Co.

When the workman determines on dealing at the shop, the mode of dealing is as follows:—The workman first procures from the shop a small pass-book, at his own cost, and when he wishes to draw anything on account of the sum authorized in the advance-book, he either takes or sends the pass-book to the cashier in the office adjoining the shop of Andrew Buchan and Co., who refers to the advance-book, and enters in the left-hand page of the pass-book the amount for which he then finds that the workman is entitled to draw. The bearer of the book, who is generally the wife or one of the family of the workman, then takes the book into the shop and gives it to the shopman, who permits

act any goods to an amount not exceeding the amount so  
 After the goods have been selected, the shopman enters  
 the column of the pass-book, "cash," being the amount  
 of goods selected, and the book is then taken by the bearer to  
 the office adjoining the shop of Andrew Buchan and  
 gives him in the current coin of the realm the amount so  
 entered in the money column. He then enters into the shop, and  
 out of the money he has so received from the cashier, he  
 takes the goods and takes them away. It was proved, however,  
 that sometimes the goods go away with the money thus received  
 from the cashier, without taking the goods they had ordered. All  
 the moneys paid by the cashier in the office adjoining the shop of  
 Buchan and Co. are repaid to Andrew Buchan and Co.  
 of the Lymney Iron Company.

It was proved upon the trial that there were other parties than  
 the company's workmen who dealt at the shop of Messrs. Buchan  
 and that the moneys paid in the shop by parties not  
 their cash from the office adjoining the shop were put in a  
 book altogether distinct till from the moneys brought from  
 the mentioned office. It was also proved that the cashier at  
 the office adjoining the shop, who is supplied with money by  
 Buchan and Co., kept his distinct account-books, in one of  
 which he entered the moneys which were not to be spent in the  
 shop, but in the other those that were.

One of these books furnishes a check upon the cashier as to  
 the sum put in his cashbox. It was further proved that the sum  
 in the cashbox of the cashier was but small, sometimes not lasting anything  
 more than a whole day, and that as soon as it was exhausted he went  
 to the office adjoining the shop and cleared it to replenish his cashbox, and  
 the money went round and round, and when there was not  
 more to be had from the till in the shop, he was supplied with  
 it by Andrew Buchan and Co.

It was proved, that of the workmen in the employ of the com-  
 pany during the year 1850 and 1851, 437 men, earning on the  
 average 1l. 240l. a month, did not deal at the shop of Andrew  
 Buchan and Co. that 409 men dealt partially, expending only 265l.  
 out of 1,324l. their average earning, and that Andrew  
 Buchan and Co. had altogether a number not exceeding 1,300  
 men among the company's workmen.

The learned judge, in giving judgment, divided the time over  
 the plaintiff's account into two periods, viz. from January,  
 1850, to January, 1851 (both months inclusive), and from February,  
 1851, to November, 1851, in the former of which periods the  
 plaintiff received 22l. 16s. and in the latter 17l. 2s. 5d. at the office  
 adjoining the shop of Andrew Buchan and Co. The whole of these  
 moneys (except the sum of 1l. 9s. above mentioned) was paid  
 to the plaintiff in the shop immediately after it had been received,  
 and which he had just before selected in the manner before  
 mentioned. So far as regarded that part of the plaintiff's claim  
 which was included in the first period from January, 1850, to

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January, 1851, amounting to the sum of 22*l.* 16*s.*, there evidence of any influence having been exercised on the part of the plaintiff's employers, or of Andrew Buchan and Co. to induce the plaintiff to deal at the shop, and the judge being of opinion that that was received by the plaintiff in the current coin of the law, the judge gave judgment for the defendant with respect to that part of the plaintiff's demand. But with regard to the remaining 17*s.* 2*s.* 5*d.* he gave judgment for the plaintiff, considering the evidence hereinafter mentioned, that subsequently to the 1st of January, 1851, the plaintiff did deal at the shop of Buchan and Co. under some degree of constraint. The plaintiff worked under an overman named David Humphreys, and the plaintiff's attorney proposed to give evidence of a conversation alleged to have taken place between David Humphreys and the plaintiff in the month of January, 1851. It was objected that the conversation, supposing it to have taken place, was not against the company, the statement of David Humphreys being within the scope of his authority. The judge at first allowed the objection, but it was afterwards proved that at the time of the conversation alluded to, a paper was produced by David Humphreys containing a list of names of men working in his level, and the plaintiff's, and David Humphreys, on being examined as to the conversation, stated as follows:—"I had a list from the office containing five names; James Olding's name was in it; I had it from Hemis, the coal clerk. He is a clerk under Mr. Bedlin (the coal agent) in the office. I had the paper from William I remember the names that did not deal at the shop." Upon the judge held that whatever was said by David Humphreys in relation to the list produced by him was admissible against the plaintiff's company. The evidence of what really took place at that interview was conflicting, but the finding of the judge in reference to this evidence was, that Humphreys intimated to the plaintiff that unless he complied with his employers' wishes in dealing more largely at the shop, he would incur their disfavor and the risk of being dismissed from their service. Under the facts thus found by him the judge drew the following conclusion:—Believing that the plaintiff was induced by threats communicated to him through the ordinary channel of communication between him and his employers to deal more at the shop than he would have done had he been permitted to follow his own inclinations, and considering that the effect of this intimidation was to make the delivery of the goods and not the cash payment the real payment, he was of opinion that the plaintiff was entitled to his judgment for 17*l.* 2*s.* 5*d.* The questions submitted for the determination of the Court of Appeal are—1st: Whether the evidence of the plaintiff and Samuel Rogers as to what was said to David Humphreys to the plaintiff under the circumstances in this case, was admissible. If the court should be of opinion that it was not, then the judgment to be entered for the defendant.

sum of 17*l.* 2*s.* 5*d.* 2nd: But if the court should be of opinion that such evidence was properly admitted, then whether the sum of 17*l.* 2*s.* 5*d.* paid by the cashier in the office adjoining that of Andrew Buchan and Co., under the circumstances of this case, was a legal payment in satisfaction and discharge of the plaintiff's wages to that extent. If the court should be of opinion that it was, then the judgment to be entered for the plaintiff should be for the said sum of 17*l.* 2*s.* 5*d.*; if otherwise, then the judgment should be for the County Court to stand.

*Attorney-General*, with him *T. Challoner Smith*, for the appellant (below).—This case is of great importance, because the Rhymney Iron Company employ a very large number of men, and in the course of business which they have adopted, have proceeded on the best legal advice. The Truck Act, 1 & 2 Will. 4, does not prohibit masters from keeping shops for the sale of their wares to their workmen; and it is highly beneficial to the workmen to be able to do so. It is a great safeguard against improvidence. That the payment otherwise than in the current coin of the realm; the court finds that the workmen at the Rhymney Iron Works were so paid. [COLERIDGE, J.—The question would rather be, whether the payment was not colourable.] If so, there is no ground for the distinction made by the judge between the first and the second part of the plaintiff's demand; because the mode of dealing was the same during the whole period. The question here is, whether the evidence of intimidation was sufficient; and it certainly was not; because Humphreys had no authority to bind the company by any declarations which he might make, wholly beyond the sphere of his duties, especially where such declarations would render the members of the company liable to heavy penalties: (sect. 9.) It was no part of the duty of the clerk or the coal clerk to endeavour to compel the men to go to the shop. Secondly: The mode of dealing was perfectly legal. [COLERIDGE, J.—Suppose the money is paid and received on an express understanding that it should be spent at the shop?] This is a very different case from the present. Here it is found that the dealing is voluntary; and an illegal threat, if given, would be sufficient to bind the master. He referred to *Chawner v. Cumming*, 11; *Lane v. Pratt*, 1 L. T. 623.

*Contra*.—Section 2 of the statute shows the intention of the Legislature, which was to prohibit every sort of interference by the master with the disposal of the workman's wages. The judgment was not appealed against the judgment of the court below; and, strong reasons might be adduced for saying, that as to that part of the claim, the judgment was wrong. First, the evidence of intimidation was inadmissible. So long as the company consist of shopkeepers, inferences may fairly be drawn from the fact of their interest to have customers; and the list of names adduced by Humphreys came through the ordinary channel of communication between the workmen and their employers. The agent is virtually the master, and the paper comes from

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his office. Besides, sect. 25 of the statute interprets employer to include all clerks or other persons engaged in the employment or superintendence of the workmen. [He was stopped.]

COLERIDGE, J.—As we have formed a clear opinion on the first point, it is unnecessary to hear any further argument upon the second and more important question. I think that the learned judge did wrong in admitting this evidence; and, first, to dispose of section 25 of the statute, it seems to me that that section has no bearing on this question. The meaning of that section is, that whenever you find the word “employer” in that statute, you may read it as meaning “masters, bailiffs, foremen, managers, clerks, and other persons engaged in the hiring, employment, or superintendence of the labour of any such artificers;” for example, when sect. 2 speaks of a contract to be made between any artificer “and his employer,” the interpretation clause takes effect; and would render the section applicable though the contract was made not by the real employer, but by some manager or clerk, as Bedlington and Hemis; but the section does not affect the question of agency, as it arises here. Then was Humphreys, the agent of the company, to bind them by his statement to the plaintiff? His duties are distinctly stated in the case. He acts under the coal agent; he has nothing to do with hiring or discharging the men; but he communicates messages to and fro between the workmen and the officers above. I think, therefore, the judge properly rejected the declaration of Humphreys in the first instance; but he appears to have thought that the production of the list of names received from the office of the coal agent altered the case. But, first, that list is traced no farther back than to Hemis, the coal clerk, whose duty is to ascertain the amount of the men’s earnings, and who also is engaged as a clerk in the office of the coal agent. Could Hemis then bind his superior Bedlington by such a communication? I think it would be very dangerous to hold that he could; and if he could not bind Bedlington, *a fortiori*, he could not bind the company. If a person employed in a subordinate situation does or says something within the scope of his employment, it may fairly be presumed that he has a general authority which renders such declarations binding upon his employer; but when he goes beyond the sphere of his duties, and still more if he does something illegal, and attended with penal consequences, it would be very unjust and unreasonable to hold his employer bound by his acts. Humphreys may have been the ordinary channel of communication between the men and their employers, but a master who usually communicates with his inferior servants by an upper servant is not on that account bound by any communication which that servant may choose to make to those under him. For these reasons I am of opinion that the evidence was not admissible, and our judgment must be for the defendant.

ERLE, J.—This is an action by a labourer for his wages; to which the answer is, payment in money; and the plaintiff replies, the payment was ostensibly in money, but really in goods, contrary

Truck Act. The plaintiff says, "You made that illegal ment with me;" and he endeavours to show such an arrangement with Humphreys or Hemis; and that evidence is not able without some evidence of authority in them to make arrangement. Their duties are stated, and it seems to me that it does not fall within the sphere of those duties to enter into a contract of that kind, attended by such important consequences; and unless some such "arrangement" can be proved as is provided in sect. 25, the plaintiff has no answer to the defence

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*Judgment reversed.*

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### COUNTY COURT APPEAL.

*May 10, 1852.*

(Before COLERIDGE and ERLE, JJ.)

COOPER v. STEPHENSON.(a)

*and client—Negligence of attorney—Insufficient inquiry as to mortgagor having been insolvent.*

*Attorney was instructed by his client to sue for a debt, but after written letters demanding payment, and threatening proceedings, advised him to accept from the debtor a mortgage security, which he did. There was some evidence that the attorney had a suspicion that the debtor had been insolvent; but he made no inquiries on that subject, except from the debtor himself. It afterwards appeared that the debtor had previously petitioned the Insolvent Court, and obtained an order for protection, and that the whole of the debt in his schedule remained unpaid: and that there was evidence to go to the jury of negligence, rendering the attorney liable to an action by the client.*

*It was an action tried before the judge of the County Court at Rochester, and a jury of the said county at Rochester, and the result was brought on a point, to which the following particulars were annexed:*

*The plaintiff claims of the defendant the sum of 50*l.* for*

*his appeal copies of the case had not been delivered to the judges. The court refused the case to be heard, but said that it should be distinctly understood that paper books delivered in County Court Appeals at the same time as in ordinary cases.*

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mortgagor.*

damages sustained by him, for that the defendant, as the attorney of the plaintiff, did not use due and proper care, diligence, and skill, in prosecuting and conducting a certain action of debt at the suit of the said plaintiff, against one William John Wells, for the recovery of the sum of 51*l.* 2*s.* 6*d.*, claimed by the said plaintiff to be due and owing to him from the said William John Wells, for goods sold and delivered by the said plaintiff to him, but instead thereof that he the said defendant took, and induced the said plaintiff to accept, a certain mortgage security of the reversionary interest of the said William John Wells in certain lands, tenements, and premises situated in the county of Kent; and, further, that the defendant, as such attorney for the said plaintiff, did not use due and proper care in ascertaining the title of the said William John Wells to the said lands, tenements, and premises, nor take due and proper care that the same should be a sufficient security for the payment of the said sum of money and interest; and, further, the said plaintiff, confiding in the conduct of the defendant as such attorney, as aforesaid, forbore to sue for, and recover his said debt against the said William John Wells, upon having a mortgage granted by him upon the said lands, tenements, and premises, as and for a sufficient security in that behalf; and the said defendant caused to be prepared and executed a certain indenture relating to the supposed estate and interest of the said William John Wells in the said lands, tenements, and premises, as and for such sufficient security for the payment of the said 51*l.* 2*s.* 6*d.*, and interest as aforesaid. Nevertheless, the said supposed title and estate, and interest of the said William John Wells, in and to the said lands, tenements, and premises, and the said indenture and security, by reason of the negligent and improper conduct of the said defendant in the premises, were not, nor are, nor will be, any sufficient security for the payment to the plaintiff of the said sum of 51*l.* 2*s.* 6*d.*, and interest, but that, on the contrary thereof, the said defendant so carelessly and negligently conducted himself in that behalf, that by reason thereof, the said plaintiff was forced to pay, and did pay, a further large sum of money in respect thereof, to the damage of the said plaintiff of 50*l.* and upwards."

At the hearing of the said cause the following facts were tendered and received in evidence:—That in October 1849, Cooper, the plaintiff, who was a boot and shoe maker, instructed Stephenson, the defendant, as his attorney, to recover the sum of 51*l.* 2*s.* 6*d.* due to him from William John Wells, a shipwright, working in Her Majesty's dockyard, at Chatham, and who was also a boot and shoe maker. That upon these instructions being given, two letters (demanding payment, and threatening proceedings) were written, and sent by the defendant's orders to William John Wells. (The letters were set out in the case.) The plaintiff having been sworn as a witness, stated, that on the evening of the said 16th of October, he went to the defendant's office by appointment, and there met the said William John Wells and the defendant. That the said William John Wells then offered the plaintiff, as a security for



of the said debt of 51*l.* 2*s.* 6*d.* with interest thereon, of a certain reversionary interest in certain houses and which he, William John Wells, said he was entitled. Defendant, as the attorney to the plaintiff, advised the plaintiff to accept the said mortgage as a good security for the said debt, and forbear from prosecuting an action for the recovery of the said debt, in consequence of the advice so given by the defendant, did forbear from prosecuting an action, and on the 30th of the same month of October, an indenture of mortgage was executed, which indenture is made between the said William John Wells of the one part, and the plaintiff of the other part. (The indenture was set out in the case, and contained the terms on which the plaintiff was to pay the debt.) The plaintiff further stated that some months after the execution of the mortgage, he discovered for the first time that the said William John Wells had been declared bankrupt by the Court for the Relief of Insolvent Debtors in the year 1849, and obtained an order for his protection, which order was made at the time of the execution of the mortgage; that the value of the insolvent to his creditors amounted to nothing; that there were no assets; and that the whole of the debt was then due, and unpaid at the time of the execution of the mortgage, and that the insolvent's reversionary interest in the said houses and land was not disclosed to the assignees; that on the discovery of the insolvency, the plaintiff, by the advice of the defendant, who was still acting as his attorney, bought up the said debts for the sum of 5*l.* 10*s.*, leaving 5*l.* 1*s.* 5*d.* to the said creditors, with whom he could not compound, and made an assignment of the said debts, amounting to 60*l.* 15*s.*, to the plaintiff, by a special power of attorney to recover and receive them. Sainock being sworn as a witness in the said cause, he was clerk to the defendant in October, 1849, but has since retired from that service. That between the 16th and 30th of October, 1849, he was in the defendant's service as clerk, the defendant made him write several times that he, the defendant, must write to the assignees to make the necessary searches, to see whether any mortgages had been entered against the said William John Wells, whether he had ever been a bankrupt, or taken the benefit of the Insolvent Acts; that it was his general duty as the clerk, to copy into the letter-book the letters which came from the defendant's office, and that he had no recollection of having seen any letters containing any directions to make the searches; that he was directed by the defendant to go to the dockyard, where William John Wells worked as a cooper, to inquire if he, Wells, had ever been insolvent; and that he showed the mortgage deed to the dockyard, and asked William John Wells himself if he had ever been insolvent, and he answered in the affirmative that the deed was executed.

William John Wells being sworn to give evidence in the said cause, she was the wife of William John Wells, and that in the year 1849, the said William John Wells had household goods,

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mortgagor.*

as she believed, of the value of 80*l.* or 100*l.*; that he still left Chatham, and, as she believes, is gone out of the country.

Upon these facts being proved, the counsel for the defendant submitted that the plaintiff ought to receive judgment of 100*l.* The plaintiff's counsel insisted that the case should go to the jury. The learned judge gave judgment of nonsuit against the defendant.

The question for the opinion of the Court of Queen's Bench was whether the learned judge was right in law in nonsuiting the plaintiff, and withdrawing the case from the consideration of the jury.

*Peterdorp (F. J. Smith with him)*, for the appellant, the defendant, said:—The judge was wrong in withdrawing the case from the jury. If there was any evidence of negligence the question was one of fact for them to determine; and there was evidence that it was the positive duty of the defendant to make due inquiry into the purpose of ascertaining whether Wells had petitioned the Court, as is stated in *Coventry's Conveyancer's Evidence*; and he neglected the performance of that duty, the question of damage is immaterial: (*Marzetti v. Williams*, 1 B. & Ad.

*G. C. Addison*, contra.—There was no duty cast on the defendant to search the Insolvent Court; and a reference to different Insolvent Acts will show that any such search would be very expensive, and probably fruitless. Under 5 & 6 Vic. c. 1, insolvent traders, whose debts are small, may petition the District Courts of Bankruptcy in the country for protection; and in such cases no returns are required to be made, except by the Lord Chancellor's secretary, under the Amending Act (7 & 8 Vict. c. 96, s. 43.) Besides, the plaintiff could not be prejudiced by omission to search at the Bankrupt or Insolvent Court, because an order in bankruptcy would affect the mortgage unless reversed pursuant to 1 & 2 Vict. c. 110, s. 19, and 2 & 3 Vict. c. 11. At all events, in order to make out such a case of negligence, the plaintiff would render the defendant liable to an action, the plaintiff would have given some evidence that it was the practice to search the Insolvent Court (*Purvis v. Landell*, 12 Cl. & F. 98). Besides, the mortgage cannot be treated as altogether void. The covenant to pay the debt is a security to pay it, as in *Maule, J., in Price v. Moulton*, 20 L. J. 104, C. P.

COLERIDGE, J.—It is not necessary for us to lay down a general rule in this case, and the judgment of the court will be founded upon the peculiar facts here stated. The question was whether there was any evidence to go to the jury of negligence, and there was evidence, I will not say proof, of these facts, that the attorney having been instructed to recover this money, for payment and threatened proceedings; but that an offer was made of a mortgage, he advised his client to accept it as security. Now, if he knew or suspected, or even guessed, that Wells, the debtor, had previously taken the benefit of the Insolvent Act, I think it was a necessary and proper step for

the inquiry; and there is some evidence that he had a suspicion of that kind, and that he himself thought that it was his duty to make some inquiry, and to give his agents instruction to make the necessary searches: but according to the recollection of the clerk such inquiry was made, nor were any such instructions ever given: a certain inquiry he did make, namely, of the debtor himself, but of course such an inquiry was futile. The defendant, therefore, thought it his duty to make inquiry: he made an efficient inquiry, and then the very thing appears actually to have taken place, about which he had felt that some inquiry was necessary. Mr. Addison says, that under Lord Brougham's Act an inquiry might have been instituted without success; but it does not appear that this insolvency was under that statute. At all events, any matter of that sort might have been adduced by way of excuse, and in answer to the plaintiff's case; but the course taken by the judge precluded that; because he held that upon the plaintiff's case there was no evidence for the jury.

ERLE, J.—We do not lay down any general rule; we only say, that in some cases, where the attorney has reason to suspect that the party offering the security has been through the Insolvent Court, he ought to institute some reasonable inquiry; and here the defendant has, by his own language and conduct, settled the question whether he had such suspicion.

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STEPHENSON.  
1852.

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attorney—  
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mortgagor.*

*Judgment reversed.*

**LONDON :**  
**PRINTED BY JOHN CROCKFORD, 29, ESSEX-STREET,**  
**STRAND.**

# INDEX.

## ABANDONING EXCESS.

Plaintiff claimed from the defendant a sum of 227*l.* Against this he gave him a set-off for 116*l.* 16*s.* 9*d.*, and a balance of 70*l.* Of the remainder he abandoned 3*s.* 3*d.*, so as to reduce his demand and thus to bring it within the jurisdiction of the County Court, and sued there for the sum.

On motion for a prohibition, that came within the principle in *Wood-Newman* (1 Cox & Macrae, 241), the County Court had no jurisdiction. *v. Capper*, 243

A party sues in a County Court in respect of a cause of action to a greater amount than the abandonment of the excess by 9 & 10 Vict. c. 95, s. 63, need appear on the face of the plaint or of the particulars of demand, but may be made known before the hearing.

Judges, however, recommend that it be made in the plaint. *Isaacs v. O*

## ADJOURNMENT.

If the defendant is present in court and asks for an adjournment on the ground of the absence of a material witness, he may be sworn on oath *vide voce*, instead of by affidavit. *Wise v. Arnold*, 70

## AFFIDAVIT.

A statement stating that the plaintiff and defendant both residing within the jurisdiction of the County Court of Middlesex, and the defendant liable to be summoned thereto, is without specifying that the defendant resided within the jurisdiction of the County Court of Middlesex, as limited by the Statute. *Sansom v. Price*, 40

DEFINITION.

## APPEAL.

F. brought his plaint in the County Court to recover from C. the sum of 34*l.* 12*s.* 1*d.*, balance due for goods sold and delivered. C. relied on the Statute of Limitations to defeat the claim. The goods were sold in 1842; and, in order to take the case out of the Statute of Limitations, F. relied mainly on a letter from C. dated April 25, 1845, the material parts of which were as follow:—

"I must candidly tell you once for all, I never shall be able to pay you in cash, but you may have any of the goods we have at the Pantehnicon, by paying the expenses incurred thereon, without which they cannot be taken out." A witness was also called by F., who proved that in 1844 he had an interview with C. respecting the debt, when accounts were stated, and the balance now sued for was admitted to be due; and that in March, 1845, it was agreed that F. should take goods belonging to C. from the Pantehnicon; that goods were selected for that purpose, but C. failed to forward them.

The plaint was tried without a jury; and the judge, considering the letter and the above evidence sufficient to bar the Statute of Limitations, gave judgment for F. (the plaintiff below.)

On appeal, the court reversed the decision, and gave judgment for C. (the defendant below) with costs of the appeal.

An appeal will lie from the County Court in cases where neither party calls for a jury, and the judge is left to decide on both law and fact.

In appeal cases from the County Court (the Chief Justice being excluded by the statute from the hearing of them) the court will simply give judgment, without stating reasons for the conclusions it has arrived at, in like manner as in cases where it is called upon to review the decisions of commissioners of taxes. *Cawley v. Farnell*, 514

Judgment having been recovered in the County

Court on the 17th January against the defendant, he, on the 22nd, gave the plaintiff notice of appeal, and the day following entered into a bond with a surety to pay the costs of the appeal, whatever the event might be, and the amount of the judgment, if the appeal were dismissed. On the 24th he withdrew the notice, and subsequently, on the last-mentioned day, served the plaintiff with a fresh notice of appeal, including several additional grounds of appeal, but no fresh security was given.

Held, that this court had jurisdiction to hear the appeal, and judgment given for the appellant with costs, notwithstanding the terms of the bond. *Daniells, app., Charsley, resp.*, 535

A plaintiff for breach of covenant was tried by a jury and a verdict found for the plaintiff. The defendant appealed, on the ground that the judge had improperly received certain evidence. The court was of opinion that the evidence had been improperly received, and the defendant applied that judgment might be entered for him.

Held that, under 13 & Vict. c. 61, s. 14, the court had no power to set aside the verdict of the jury, and to direct judgment to be entered for the defendant, and that it could do no more than direct a new trial. *Jones, app., v. Adams, resp.*, 555

#### ARBITRATION.

A lay arbitrator, under a submission, which provided that the costs of the submission and award should be in the discretion of the arbitrator, awarded to himself an excessive amount of remuneration. The plaintiff was compelled to pay that sum in order to get the award. The amount having been reduced by the master upon taxation.

Held, that the arbitrator could not by his award conclusively fix the amount of the costs. And, further, that the plaintiff might recover the excess beyond the amount of fair remuneration, in an action against the arbitrator for money had and received to his (the plaintiff's) use. *Fernley v. Branson*, 460

#### ATTORNEY.

An attorney may still sue in the Superior Courts of law at Westminster for business done by him as an attorney, and will be entitled to his full costs of suit, though the amount recovered be less than 20*l*. *Nixon v. Johnson*, 38  
It is enacted, by sect. 67 of the County Courts Act, that "no privilege, except as hereinafter excepted, shall be allowed to any person to exempt him from the jurisdiction of any Court holden under this Act." The only

exceptions are the Universities and chartered Companies, by sects. 140 and 141; and by sect. 129, it is enacted, "that no action shall be commenced after the 1st day of January 1882, in any of Her Majesty's Superior Courts of Record, for any purpose other than those lastly hereinbefore excepted, in which a plaintiff might have been able to sue in any Court holden under this Act, if the plaintiff had obtained judgment for the plaintiff less than 20*l*., if the said action was founded on contract, or less than 5*l*. if founded on tort, the said plaintiff shall be entitled to recover such sum as may be found to be due to him with costs."

Held, that these sections do not deprive an attorney plaintiff of his privilege of suing in the Superior Courts, and that he is entitled to costs in an action brought by him in the Superior Courts, although he might have sued in the County Court.

*Semble*, that the language of the section does take away the privilege of an attorney to be sued in his own court. *v. Savage*, 75

An attorney is still privileged to sue in the Superior Court for debts and demands within the jurisdiction of the County Court, notwithstanding the provisions of the 67th section of the County Courts Act, confirming the decision of the Court of Appeal in the case of *Lewis v. Haigh*, which Rule to deprive an attorney plaintiff who has sued in the Superior Court of his cause of action within the jurisdiction of the County Court, will be discharged. *Jones v. Brown*, 102

The 91st section of the County Courts Act, 9 & 10 Vict. c. 95, limiting the costs of an attorney for "appearing or acting in the said court, extends equally to matters done by the attorney between attorney and client, as to all matters done by the attorney to the suit previously to the hearing. *Green*, 136

The 49th section of the London & Westminster District Courts Act, 10 & 11 Vict. c. lxxi, abolishes the privilege of attorneys to be sued in their own courts. *Jefferies v. Jefferies*, 136

An attorney was instructed by his client for a debt, but after having writ demanding payment, and threatened proceedings, advised him to accept of the debtor a mortgage security, which was not a mortgage. There was some evidence that the attorney had a suspicion that the debtor was insolvent; but he made no inquiry into that subject, except from the debtor. It afterwards turned out that the debtor had previously petitioned the Insolvent Court and obtained an order for protection.

hole of the debts in his schedule unpaid.

that there was evidence to go to the diligence, rendering the attorney's action by the client. *Cooper v.*, 627

JUDGE, SMALL DEBTS ACT, SUGGESTION.

BAILIFF.

See EXECUTION.

ILLS OF EXCHANGE.

See JURISDICTION.

UILDING SOCIETY.

See JURISDICTION.

CARRIERS.

See RAILWAY.

AUSE OF ACTION.

advertisements were given at a office within the jurisdiction of minster County Court, and the also resided within the jurisdiction the newspaper was published in city of London. The plaintiff is action for the charges for the rents, in the Superior Courts, and 5*l.* 5*s.*

to enter a suggestion to deprive sts was made absolute.

r the cause of action in such case ly, or in some material point, within action of the County Court within defendant dwelt, or carried on ss, *quære*. *Ghislin v. Dean*, 195. aving determined, in *Grimbley v. l Cox & Mac*, 79), that the whole man's bill constitutes one cause of hin the 63rd section of the County t, if any one item of the bill arises jurisdiction of the County Court, of action arises, in some material hin that jurisdiction, under the ion.

ie plaintiff, a tailor, dwelt and carried as within the district of the County

Clerkenwell, and within twenty he defendant, who dwelt within : of the County Court of Brompton, d on his business within the dis- ie County Court of Westminster, be work had been done at the residence, and as to three items iculars, the orders were given, and delivered at the residence of the ; as to ten other items, the orders and the goods delivered at the

plaintiff's place of business, and in one instance the order was given, and the goods were delivered at the residence of the plaintiff.

Held, that there was no concurrent jurisdiction of the Superior Court with the County Court, to entertain the suit under the 128th section, and therefore the plaintiff, who had sued in the Superior Court, was not entitled to the costs of suit. *Wood v. Perry*, 208.

See JURISDICTION, SPLITTING DEMANDS.

CERTIORARI.

The application to a judge for a *certiorari* to remove a cause from the County Court, under sect. 90 of the 9 & 10 Vict. c. 95, is *ex parte*. *Hadden v. Gompertz*, 185.

A *certiorari* will be granted, on the ground that a jury had been applied for, and that a fair trial could not be had in the County Court by a jury from the locality.

Does the 90th section of the County Courts Act repeal the previous acts, 19 Geo. 3, c. 70, and 7 & 8 Geo. 4, c. 71, as to giving recognizances, *quære*? *Fowler v. Goldney*, 253.

Debts and demands of less than 5*l.* not recoverable by *certiorari*. *Green v. Arundel*, 289.

The words "by leave of a judge," mean by leave of a judge at chambers. An application, therefore, under sect. 90 of the 9 & 10 Vict. c. 95, for a *certiorari* to remove a plaint from a County Court, must be made only at chambers. *Robertson and another v. Womack*, 363.

Sect. 16 of the County Court Extension Act enacts, "that no judgment, order, or determination given or made by any judge of a County Court, nor any cause or matter brought before him, or pending in this court, shall be removed by appeal, motion, writ of error, *certiorari*, or otherwise, into any other court whatever, save and except in the manner and according to the provisions hereinbefore mentioned." And sect. 2 of the same act enacts that this and the General County Courts Act shall be construed as one.

Held, that the first-mentioned section is to be construed with reference to sect. 90 of 9 & 10 Vict. c. 95, and that the *certiorari* is not thereby taken away or limited to cases within the former jurisdiction. *Jones v. Holdsworth and another*, 426.

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error, *certiorari*, or otherwise, into any other court whatever, save and except in the manner and according to the provisions hereinbefore mentioned." And sect. 2 of the same act enacts that this and the General County Courts Act shall be construed as one.

Held, that the first-mentioned section is to be construed with reference to sect. 90 of 9 & 10 Vict. c. 95, and that the *certiorari* is not thereby taken away or limited to cases within the former jurisdiction.

Held, also, that when application is made to a judge of one of the Superior Courts at chambers for a *certiorari*, he should be put in possession of all the facts, the situation of the parties, and the stage of the cause, so as to be enabled properly to exercise the discretion given by 9 & 10 Vict. c. 95, s. 90; and therefore, where a *certiorari* had been obtained without the judge having been informed that the cause had already been heard in the County Court, the writ was set aside. *Parker v. The Bristol and Exeter Railway*, 435.

To prevent the removal of a plaintiff from the County Court by *certiorari*, on the ground of want of jurisdiction in the Superior Courts to entertain the action if removed, the plaintiff ought to be so framed as to disclose a cause of action over which the Superior Court has no jurisdiction.

Where a plaintiff was removed from the County Court by *certiorari*, on the affidavit of the defendant's attorney that difficult questions of law would arise, the court refused to quash the *certiorari*, though the affidavit of the plaintiff's attorney averred that no such difficult questions of law would arise. *Rees v. Williams*, 568

See REPLEVIN.

## CHANCERY, COURT OF.

See JURISDICTION.

## CITY OF LONDON SMALL DEBTS ACT.

It is sufficient that the affidavit on which a rule is moved to enter a suggestion on the record to deprive the plaintiff of costs states that part of the cause of action arose in one part of the city and another part in another, without stating expressly that the whole debt arose within the city. *Orgill v. Stinson*, 249

## CLERK.

The court of each district is a distinct court. Therefore the clerk of one district Court is not precluded by the 29th and 30th sections of the County Courts Act from practising in other district Courts in the same county. *Cheek v. Park*, 24

No money should be received by a clerk after the expiration of the five days before the court-day. *Thomas v. J.*

A clerk of a County Court gave orders fitting up of the court-house, for which action was brought against him per

Held, that neither his office, nor the subject-matter of the action, raised a presumption that would exempt him from personal liability. *Audley v. H.* 189

In June, 1846, A. was performing the duties of clerk under a Small Debts Act, in schedule B. of 9 & 10 Vict. c. 95, as deputy for his father, who had been formerly appointed clerk, but was, by reason of sequence of illness, unable to discharge his duties:

Held, that A. was not entitled under sect. 34 of that act, to be the first clerk of the same court when holden as a County Court under that act, that section relating to a person who merely performed the duties as deputy for another, but persons who were either clerks *de jure* or *facto* of the old court.

A statement in the rule nisi *quod warranto*, that "the defendant is indebted to the plaintiff in the sum of £100," is not sufficient compliance with the rule nisi. (H. T. 7 & 8 Geo. 4.) *Reg. v. B.*

An action will lie against a clerk of a County Court for publishing a letter, stating that the defendant in the court had not been committed for a simple debt, but for sums of money he had embezzled from his master. But the damages were not recoverable and the judge refused to certify. *Riley*, 255

Mere insolvency does not constitute a ground of "inability" mentioned in sect. 24, of stat. 9 & 10 Vict. c. 95, as a ground for the discharge of a clerk of a County Court.

The decision of the judge of a County Court, approved by the Lord Chancellor with respect to the inability or misfeasance of a clerk under sect. 24, of stat. 9 & 10 Vict. c. 95, is not conclusive, but the judge has a right to have that decision reviewed by this court and a jury in proceedings *quo warranto*. *Reg. (on the relation of Williams) v. Owen*, 368

The order of a judge, on a judgment being given to pay at a future time, or to be imprisoned, is not bad.

The minute of the proceedings of a County Court kept by the clerk, in pursuance of sect. 111 of 9 & 10 Vict. c. 95, is not conclusive evidence, and may be contradicted by the evidence of the clerk of the court.



of the County Court is a minor and is not liable in trespass for being on a warrant made in pursuance of a bad order of the court; and in trespass against him he may raise a general issue, and give the special defence, under 13 & 14 Vict. *Dewes v. Riley*, 523

#### COMMITMENT.

A debtor having been ordered to pay by instalments under the 8 & 9 s. 1, was committed to prison on non-payment of one instalment. Having been brought up on a writ, and the warrant not showing that he had been summoned to show cause why he had made such default, was committed, and the prisoner was discharged. *Thomas Kinning*, 16

A judge of an Inferior Court of the recovery of small debts, sect. 1 of 8 & 9 Vict. c. 127, issued a summons calling upon A. B. to show why he did not pay the debt. Judgment recovered in that debt by the nonappearance of A. B. to show cause, and then ordered him to be committed for forty days "in the common law debtors under judgment and of the Superior Courts may be committed in the county of Middlesex."

The order was valid, though made in the absence of the defendant; and although it appeared to be made in the absence of the defendant.

It did not matter that the prisoner was committed to a gaol locally situated in the city of London, built under an Act of Parliament as a debtors' gaol both for the county of Middlesex:

because this was a gaol for debtors of the county of Middlesex," according to the meaning of those words in sect. 1 of c. 127, and that the custody, was proper.

It was upon payment of the money that he would have no discretion, but he would be absolutely entitled to his writ. *Ex parte Bowdler*, 160

Ordered by an order of commitment, framed by the judges under the provisions of the County Courts Act, that the defendant appeared to the summons, and on his application, the judge granted judgment postponed and adjourned making do that, at the said adjournment, the defendant did not attend, or allege any excuse for not attending, and

did not produce any evidence, or allege any sufficient excuse for the non-production of such evidence, and that it then appeared to the said judge that the said defendant had obtained credit from the plaintiff under false pretences, and had made a gift, delivery, or transfer of his property, with intent to defraud his creditors; and that thereupon he did order the said defendant to be committed, &c.

Held, that such order of commitment was good, that a fresh summons under the 98th and 99th sections was unnecessary, and that the case came within the 101st section of the County Courts Act.

Held, also, that the commitment, not being in the nature of a conviction, was not to be construed with the same strictness, and was not bad for stating the mode of committing the offence in the alternative. *Ex parte Purday*, 339

To an action for trespass and false imprisonment, the defendant justified (under 8 & 9 Vict. c. 127) by process from the Sheriffs' Court of the city of London. His plea showed that a judgment had been recovered in an inferior court against the plaintiff by one W. T.; that a summons against the plaintiff for not having paid the sum so recovered was duly served on him; that he appeared, and thereupon the judge made an order upon him for payment of the debt by instalments, and that afterwards, and before the said time when, &c., the judge, upon proof that an instalment was unpaid, made an order that the plaintiff should be imprisoned forty days; and afterwards the judge, at the request of the defendant, then being the attorney of and for the said W. T., duly and according to the form of the statute, issued his warrant for the commitment of the plaintiff, upon which he was taken and imprisoned, &c.

Replication, that the said order was not made *modo et forma*.

At the trial, the defendant, in order to sustain his plea, produced an order of commitment, which corresponded with that described in the plea, but it contained no recital of a previous summons calling on the plaintiff to show cause why he should not be committed to prison. The learned judge at the trial directed the jury to find a verdict for the defendant on this issue, and they found accordingly.

A rule on behalf of the plaintiff having been obtained, calling upon the defendant to show cause why there should not be a new trial on the ground of misdirection, or why judgment should not be entered for the plaintiff, *non obstante veredicto*:

Held, that the order of commitment was invalid, because it did not show that a previous summons to show cause why he had made default in payment of the instalment had been served on the plaintiff, and therefore, as the replication traversing the order raised an issue which the defendant had not supported, because the order was bad, the judge ought to have directed the jury to find for the plaintiff, and the rule must be absolute for a new trial. *Kinzing v. Buchanan*, 375

The warrant of commitment stated that the plaintiff had wilfully insulted the judge, who thereupon ordered him to be taken into custody, and proceeded "these are therefore to require you," &c., to deliver him to the keeper of the house of correction, &c.:

Held, that the warrant was good,—that it was not necessary to state what the result was; and that the word "therefore" did not render the warrant uncertain, and, in consequence, bad.

*Semble*, the courts held under 9 & 10 Vict. c. 95, are Inferior Courts. *Levy v. Moylen*, 398

Where a prisoner had been committed by order of the judge of the County Court for non-payment of a sum adjudged against him, and he had obtained a writ of *habeas corpus*, on the ground that the order was bad, as being made in the alternative to pay or go to prison, the court, on motion, ordered him to be discharged, proof being made of service of the rule upon the plaintiff in the suit, and upon the officer of the court. *Re Dews*, 404

The judge of a County Court made an order on a defendant to pay a debt, adjudged against him, by instalments, "or" that he be committed to prison. The defendant made default, and thereupon a warrant was issued for his commitment:

Held, that the defendant had a right to be heard in his defence before committal; and that an order for his imprisonment, on default of payment, embodied in an order to pay by instalments, was bad. *Abdey v. Dale*, 416

A defendant had been committed, under sect. 95, for nonpayment of a debt, according to the order of the court. The judgment was dated July 12, 1848, and the order for commitment was not made until November 12, 1850. The judgment had not been revived by *sci. fa.* or otherwise.

On motion for *habeas corpus* to bring up the prisoner to be discharged on this ground, the court refused the rule.

*Semble*, a judgment after a year and a day is voidable only, and not void:

*Quere*, if it be necessary to revivify the commitment in the County Court? *Re H.* 425

It is not necessary that the warrant of commitment of a defendant on default of a debt recovered in the County Court, should be issued immediately on the date of the judge's order for imprisonment.

Where the order of commitment of payment was made on the 15th but the warrant for arrest and imprisonment was not issued till the 9th of October following:

Held, that in the absence of any practice, limiting the period within which a warrant must issue, such lapse of time was not a sufficient ground for the discharge of a defaulting defendant who had been arrested and imprisoned. *Re Jones*, 484

The 131st rule of the "Practice and Proceedings of the County Courts"

"Warrants for commitment, when made, shall bear date on the day on which the commitment was made, and shall be in force for three calendar months from such date, and no longer." Having judgment against him in the County Court, and an order made on him to pay a debt and costs by instalments, and whereupon a judgment-summons was issued, and on his non-appearance thereupon a warrant of commitment was issued against him. The warrant authorized the arrest of the debtor, and his commitment to prison for the term of ten days from the date of arrest." The warrant bore date of September, 1851, and on the 1st of December following the debtor was arrested and delivered into the custody of the keeper of the prison to whom it was directed. He was detained the debtor until the 2nd of the same month, being seven days and three months during which the warrant was to be of full force and effect.

The debtor brought his action against the gaoler for assault and imprisonment, and the latter pleaded justification under the warrant. To this the plaintiff replied that the warrant was in violation of the 131st rule of the "Practice and Proceedings of the County Courts," was to be in force three calendar months, and that although he was arrested at that period, and was imprisoned more than ten days, yet he was unlawfully detained in prison seven days beyond the term of three calendar months during which the warrant was to run:

Held, on general demurrer, that the defence was no answer to the plea;

the warrant was to remain in force months from the date of the order tment, the debtor, having been ithin that period, was to be imfor the number of days specified rant, notwithstanding the three aring which it had force were exre the debtor had completed the mprisonment which the County ge had ordered. *Hayes v. Keene*,

DEBTS ACT.

COMPENSATION.

See OFFICERS.

CONTEMPT.

See OFFICER.

JRRENT JURISDICTION.

r a judge at chambers has not a ry power under 13 & 14 Vict. 3, but an authority is thereby conch they are bound to exercise by plaintiff an order for his costs in the three cases in which, by that jurisdiction is given to make such eruling *Jones v. Harrison* (*ante*,

the plaintiff has a permanent dwelthan twenty miles from the deie Superior Courts have concurrent a under the 9 & 10 Vict. c. 95, although the plaintiff has also for a temporary purpose, at the action is brought, within twenty ie defendant.

that if a plaintiff has two dwellings, twenty miles of the defendant, her more than that distance, the ourts have concurrent jurisdiction. *Il v. Paterson*, 544

: a judge at chambers has not a ry power under the 13th section Vict. c. 61, which provides that than 20*l.* is recovered in an action erior Courts, and it shall be made to the satisfaction of the court or chambers that the action was of tion therein specified, such court 'may thereupon by rule or order t the plaintiff shall recover his t that section confers an authority ourt or judge to grant costs which ive in cases falling within that

ing *Macdougall v. Paterson*, *ante*, ie v. *Powell*, 587

COSTS.

Costs of notice of special defence will be allowed to defendant when the action has been abandoned by the plaintiff, but this court has no power to direct payment of other costs than the fees of court, and the costs of the application and order. The advocate's fee cannot be allowed in such a case. *Andrew v. Hocking*, 50

Where plaint is withdrawn, defendant is entitled to his costs. *Phelps and another v. Lloyd*, 51

Where defendant had left the amount of the debt at the house of the plaintiff during his absence, in the interval between the issuing and service of the summons :

Held, that plaintiff was entitled to his costs.

*Dyer v. Cooper*, 57

Section 91 of 9 & 10 Vict. c. 95, provides that "no attorney shall be entitled to have or recover therefore any sum of money, unless the debt or damage claimed shall be more than 40*s.*, or to have or recover more than 10*s.* for fees and costs, unless the debt or damage claimed shall be more than 5*l.*, or more than 15*s.* in any case within the summary jurisdiction given by this act."

Held, 1st. That the above provisions apply only to business done in court.

2nd. That they do not abolish the ordinary distinction between the costs to be allowed between party and party, and the remuneration that an attorney is entitled to from his client.

3rdly. That an attorney is entitled to recover from his client for work done out of court, in a suit in the County Court, a reasonable remuneration beyond what is allowed by the above section.

Overruling *Ex parte Clipperton* (1 Cox & Mac. 136.) *Ex parte Keighley, re Keighley v. Goodman*, 284

The 91st section of 9 & 10 Vict. c. 95, limiting the fee of an attorney for "appearing or acting" on behalf of any person in the County Court, applies only to the appearing and acting in court, and not to matters done by the attorney in relation to the suit previously to the hearing: (Overruling *Ex parte Clipperton, re Green*, 1 Cox & Mac. 136.) *Re Toby*, 324

In an action of debt in a Superior Court, the defendant paid into court the sum of 12*l.* 13*s.* 3*d.*, and the plaintiff took out that sum in satisfaction of his claim, and entered a *nolle prosequi* as to the residue of the causes of action: he then applied to a judge at chambers under the 13th section of the 13 & 14 Vict. c. 61, and obtained an order for costs on the statement of the attorney's

clerk, unsupported by affidavit. On an application to the court for a rule to rescind such order, it not appearing by the affidavits that any objection was made to the judge at chambers entertaining the case, the court refused the rule.

A rule having been subsequently granted on amended affidavits,

Held, that the 13th section of the County Courts Extension Act, which gives power to a judge to make an order for the plaintiff to have his costs in certain cases was not applicable to the above case; but that the plaintiff was entitled to his costs under Reg. Gen. Trin. Term, 1 Vict. *Power v. Jones*, 422.

Where the plaintiff's debt is reduced below 20*l.* by set-off, the court at the trial will grant a certificate to empower the plaintiff to receive costs. *Osmond v. Poore*, 427

A plaintiff obtaining judgment upon demurrer in an action of covenant, and recovering less than 20*l.* damages upon a writ of enquiry, is deprived of his costs by the 11th section of the County Courts Extension Act.

*Quere*, whether the word "verdict," in the 12th section of 13 & 14 Vict. c. 61, includes a verdict on a writ of inquiry: (see *Reed v. Scrubsole*, 1 Cox, Mac. & Herts. 226.) *Prew v. Squire*, 449

By the 13 & 14 Vict. c. 61, s. 13 (County Courts Extension Act), it is provided that if the plaintiff shall make it appear to the satisfaction of the court in which the action is brought, or to a judge at chambers upon summons, that the action was brought for a cause in which concurrent jurisdiction is given to the Superior Courts by the 128th section of the previous County Courts Act (9 & 10 Vict. c. 95), or for which no plaint could have been entered in any such County Court, or that the said cause was removed from a County Court by *certiorari*, then and in any of such cases the court in which the said action is brought, or the said judge at chambers, may thereupon, by rule or order, direct that the plaintiff shall receive his costs, and thereupon the plaintiff shall have the same judgment to recover his costs that he would have had if that act had not been passed:

Held, that the word "may," in the above section, is permissive only, and not imperative, and that the court or judge can exercise a discretion upon the case under the circumstances as brought before them. *Jones v. Harrison*, 489

A judge at chambers has jurisdiction under the 13th section of 13 & 14 Vict. c. 61, to order costs, notwithstanding an order of reference, whereby the arbitrators had the same powers

to certify as a judge. *Sharp*, 512

Application was made on the 26th judge at chambers to allow the costs under 13 & 14 Vict. c. 61; summons was dismissed, and the attorney accepted the damages that he did so without prejudice right to costs. On the 12th following, notice was given, and an application was again made to the judge. It was held to be too late.

*Mosley*, 579

Where the secondary of London gave a certificate under 13 & 14 s. 12, that there was a sufficient suing in the Superior Court, the Banco refused to review it although to have been given under an expression. *Tudor v. Jones*, 581

See APPEAL; ATTORNEY; JURISDICTION; PAUPER; PAY COURT.

## COUNSEL

A barrister cannot be heard in Court unless instructed by an attorney section 91 of stat. 9 & 10 Vict. *terd v. Rendall*, 49

A barrister *bonâ fide* attending a Court is privileged from arrest. *Russ*, 143

## EXECUTION.

Execution will be ordered to be instalment separately. *Nicholcock*, 57

A debtor had been summoned by the County Court for a debt; the debtor did not appear, the creditor proved his claim, whereupon the court ordered the amount to be paid to the clerk of the court, at a time between ten and four o'clock on the same day, the amount having been paid, a levy was made by execution issued, on such order:

Held, that the order to pay the amount; that no previous service of notice of it need be given, the amount not having been paid; that the execution and levy were perfectly regular. *Ely v. Moule*, 408

Sect. 96 of the County Courts Act 1846, relating to wearing apparel and implements, does not apply to an execution against the County Courts.

But where the landlord gave a

writing-under sect. 107, claiming rent, the bailiff may distrain such pannel and implements of trade, in satisfy the rent so claimed. *Woodward and another*, 428  
 recovered by the judgment of the court with costs. The debt alone not paid, the clerk of the County Court issued execution for the costs. Before coming to this court for a writ to the clerk, application should be made to the judge of the County Court for a writ to issue execution. *Ex parte Overseers of Christchurch*, 578  
 who has obtained judgment for debt in the County Court, and has obtained from the defendant, out of court, the whole or part of the debt, is not entitled to a writ of execution for the residue of the debt and the costs, or for the residue of the case may be, although in the County Court judgment is to pay the money into the Court of Queen's Bench will be refused to the clerk of the County Court manding him to issue such writ of execution. *Reg. v. The Clerk of the County of Surrey*, 613

#### DEBT AND TENANT.

##### EXECUTOR.

defendant, an executor, is served with summons upon a *deceitavit*, after a writ of assets *quando acciderint*, notwithstanding there is no form of summons, the rules drawn up by the judges are such a judgment, the court will grant a prohibition.  
 method of proceeding for assets of the executor since plea pleaded, stating the judgment *quando acciderint* and suggesting assets after plea. *Ellis v. Watt, Executor, &c.* 317

##### EVIDENCE.

a defence of *nul tiel* record to an County Court, on a judgment of the County Court, proof of the judgment made by *certiorari* and *mittimus* out of Chancery, as in the case record pleaded in the Superior Court not by producing an examined record in the Superior Court. will not, in support of a motion to quash, entertain an objection that the record, or not properly taken, in the case. *Winsor v. Dunford*, 132

##### WRIT OF HABEAS CORPUS.

having been arrested and im-

prisoned by the defendants, who were police constables, on a charge of furious driving, brought an action of tort against them in the County Court. At the trial the plaintiff, in opening his case, stated that the defendants had taken him into custody, and detained him for some time in a station-house on a false and unfounded charge of furious driving, and that on their evidence he had been convicted of the offence by two justices of the peace, and fined 20s. For the defendants, it was thereupon objected that by that admission the plaintiff had put himself out of court. A copy of the conviction was put in evidence; the plaintiff admitted he had paid the penalty, and had not appealed against the decision of the magistrates; and the County Court judge, considering that the conviction was a conclusive answer to the action, so directed the jury, and a verdict was accordingly found for the defendants. The judge stated the case for this appeal, but it did not show that the plaintiff committed the offence of furious driving within view of the defendants, so as to justify the arrest of plaintiff under 2 & 3 Vict. c. 47, s. 54:

Held, on appeal, that the decision of the County Court judge was wrong, and the judgment must be reversed.

On appeal, the court will not send back a badly drawn case to be restated, but will dismiss the appeal with costs. *Justice, app., Gosling and others, resps.*, 609

##### FALSE JUDGMENT.

The record of an Inferior Court showed that upon an issue upon *nil debet*, the jury found a verdict for the plaintiff for 14s. 8d., and for the defendant as to the residue, and awarded costs to the plaintiff:

Held, that a writ of false judgment would not lie, because no costs had been awarded to the defendant, in respect of so much of the issue as was found for him.

Costs are not allowed on writs of false judgment to either party. *Whitehouse v. Owen*, 299

##### FEE.

Where a plaintiff has been nonsuited and the plaintiff struck out of the list in consequence of his accidental absence, owing to a misunderstanding as to the time of holding the court, he will be allowed to enter a new plaintiff without again paying the fee-fund-fee. *Bousfield v. Whitehead*, 63

Where a plaintiff has been nonsuited, and the plaintiff struck out of the list, in consequence of his accidental absence, owing to a mis-

understanding as to the time of holding the court, he will be allowed to enter a new plaint without again paying the fee-fund-fee. *Bousfield v. Whitehead*, 70

### FRAUD.

A. bought of B. 118 sheep, and being unable to pay for the whole, went to C., and agreed to sell him fifty sheep at 1*l.* each, C. agreeing to give up the sheep to A. on the Thursday following, upon being paid 46*l.* A. received from C. a cheque, post-dated, upon his bankers, for the 46*l.*, and gave the same to B. (who could not read) as part payment for the 118 sheep. B. presented it, and the bankers refused payment, as it was post-dated, and the day of the date had not arrived. A. not delivering to C. the fifty sheep, C. stopped payment of the cheque. B. sued A. and C. in tort in the County Court for defrauding and deceiving him, whereby he was induced to deliver up his 118 sheep. Verdict for the plaintiff 46*l.* C. appealed from this decision:

Held, there was no case against C., and that the verdict should be set aside, and a nonsuit entered.

The unsuccessful party in the court above, upon County Court appeals, must pay the costs. *Watson, app., Poulson, resp.*, 550

### HIGH BAILIFF.

It was competent for the Queen in Council by order, under sect. 5, absolutely to abolish any court mentioned in schedules A. or B. of the County Court Act, and in case of any such court being so abolished, the high bailiff has no claim under sect. 34 of the statute to be the first high bailiff of a county court established in the same place in substitution for the local court so abolished. *Reg. v. Dyer*, 265

The high bailiff of a County Court received a warrant for the commitment of T. S., which he delivered to his under-bailiff to execute. The under-bailiff broke into the plaintiff's factory to search for T. S., and during the search he was assaulted by the plaintiff. He then left the factory, and returned with a policeman, and took the plaintiff into custody for the assault.

Held, 1st. That the high bailiff was liable for the trespass committed by the under-bailiff in breaking into the plaintiff's factory to execute the warrant.

2nd. That he was not liable for the assault

and false imprisonment committed under-bailiff in sending for a police giving the plaintiff into custody, under-bailiff in doing so acted, in colour of the warrant, but under sect. 9 & 10 Vict. c. 95.

3rd. That the power to arrest, 9 & 10 Vict. c. 95, s. 114, is not optional. *Smith v. Pritchard*, 272

### HIGHWAYS.

At a vestry meeting to examine the account of an outgoing surveyor, certain items were objected to, and an opposition entered before the justices. Upon this, he offered to pay 50*l.* if no opposition were entered, which offer was accepted, and a minute to that effect was signed by the other vestrymen, together with a minute at the foot of the account that 50*l.* must be paid to the defendant's solicitor in office. The accounts were passed without opposition, but the defendant did not pay the 50*l.*, and the plaintiff, who had been appointed the successor of the defendant in office, sued him for the 50*l.* the County Court.

Held, that there was no evidence of a contract between the plaintiff and defendant to entitle the former to maintain an action for the 50*l.*, and that, if the 50*l.* was considered as a balance in the hands of the outgoing surveyor, the proper remedy would be under the 103rd section of the Will. 4, c. 50. *Kilham v. Collyer*

### INSOLVENCY.

In order to give the judge of a County Court jurisdiction in the case of an insolvent petitioner, the petitioner must have been continuously for six months before the filing of the petition in the district at which the petition is filed. Resisting the petition in another district of the same County is not enough. *Reg. v. F. K. Eagle*, 1 The act 5 & 6 Vict. c. 116, does not require that an insolvent petitioner for protection under that statute should be possessed of any estate whatsoever at the time of his petition. *Lawrie v. Bendall*, 1 By the 7 & 8 Vict. c. 96, all the estates, present and future, of an insolvent debtor to him before final order, is vested in assignees, and property subsequently acquired can only be dealt with under the provisions of 5 & 6 Vict. c. 116, s. 9.

The effect of the 7 & 8 Vict. c. 96, is to give to the final order for protection the effect as a final order under 5 &

and to protect the after-acquired as well as the person of the insolvent may be pleaded in bar as such, s. 10th section. *Jacobs v. Hyde, Bevil, 156*

been an assistant commissioner of , was awarded an annuity as a tion on the abolition of the office. uently became insolvent:

hat the annuity passed over to the under 1 & 2 Vict. c. 110, s. 56. *Payne, 215*

### INTEREST.

cannot be maintained for interest due t exceeding 20l., inasmuch as it is to prove the debt in order to esse claim for interest. *Orchard v. 59*

### INTERPLEADER.

t is directed, that "when any claim ade to or in respect of any goods s taken in execution under the pro- y court holden under the authority d act, or in respect of the proceeds hereof, by any landlord for rent, or rson not being the party against ch process has issued, and sum- ave been issued on the application icer charged with the execution of ss, such summonses shall be served ime and manner as hereinbefore or a summons to appear to a plaintiff, aimant shall be deemed to be the nd the execution creditor; the and the claimant shall, five days : day on which the summonses are , deliver to the said officer, or leave ce of the clerk of the court, a par- any goods or chattels alleged to be ty of the claimant, and the grounds im, or, in case of a claim for rent, ount thereof, and for what period is claimed to be due."

claimed goods seized by a bailiff in issued from the County Court at f B. Summonses had been issued l B. The notice under the above actice was in the form following: ndersigned, &c., do hereby give you at the several goods and chattels tten (specifying them) are, and of such goods and chattels were, ne of the seizing of the same, my rty and not the property of Ross." rst, that the judges were empow- nake such a rule of practice as der the powers given to them by ection of the County Courts Acts.

Held, secondly, that the County Court judge had rightly decided that the 39th rule of practice had not been complied with by particulars merely specifying the goods, and stating the amount of claim.

The grounds of the claim must be explicitly stated. *Reg. v. Chilton, 293*

By sect. 118 of 9 & 10 Vict. c. 95, it is enacted, "that if any claim shall be made to or in respect of any goods or chattels taken in execution under the process of any court holden under this act, or in respect of the proceeds or value thereof, by any landlord for rent, or by any person not being the party against whom such process has issued, it shall be lawful for the clerk of the court, upon application of the officer charged with the execution of such process, as well before as after any action brought against such officer, to issue a summons calling before the said court as well the party issuing such process as the party making such claim, and thereupon any action which shall have been brought in any of her Majesty's Superior Courts of Record, or in any local or inferior court, in respect of such claim, shall be stayed, and the court in which such action shall have been brought, or any judge thereof, on proof of the issue of such summons, and that the goods and chattels were so taken in execution, may order the party so bringing such action to pay the costs of all proceedings had upon such action after the issue of such summons out of the County Court; and the judge of the County Court shall adjudicate upon such claim, and make such order between the parties in respect thereof, and of the cost of the proceedings, as to him shall seem fit, and such order shall be enforced in like manner as any order made in any suit brought in such court."

Summonses had been issued under this section in a case of a disputed claim, and at the hearing it was objected that no sufficient notice had been served by the plaintiff of his grounds of claim under rule 39. The judge held the objection to be fatal, and decided that the goods were those of the defendant, in the original suit, and liable to the process of the court.

An action was brought against the officer of the County Court for seizing and selling these goods, and on a motion to set aside proceedings in such action:

Held, that the Judge of the County Court having decided against the claim, that decision was conclusive, and that no action would lie against the officers for breaking the house or taking the goods, unless for an excess of violence in such breaking or taking.

This court will not entertain an appeal

from the decision of the County Court. *Jessop v. Crawley and others*, 296

Where a judge of a County Court refuses to hear an application upon an erroneous supposition that some preliminary requirements has not been complied with, this court will interfere by *mandamus* to compel him to hear.

Judgment having been obtained against a defendant in an action in the County Court, execution issued, and certain property was seized thereunder. A claim was then made by A. and B. that such goods were theirs, and the form of their grounds of claim was, "that the said two horses, two collars, and two bridles were assigned to us by an indenture, dated the 28th day of May, 1850, and made between," &c. (stating the parties.) Upon an objection taken at the trial, that this statement was not a compliance with rule 39, the judge held the objection to be good, and refused to hear the claim.

Upon an application to this court for a *mandamus* to the judge to hear the claim:

Held, that the statement of the ground of claim was sufficient, and the *mandamus* was ordered to go. *Ex parte Harper and another*, 492

Goods having been seized under an execution out of a County Court, a third party claimed them under an assignment, whereupon the bailiff took out an interpleader summons. The claimant in due time delivered a particular of the goods he claimed, stating (without specifying them individually) that he claimed all the goods possessed by the defendant, and setting forth his title. On the hearing it was objected that the claim was bad, in not specifying the goods or including them item by item in a schedule, which objection the judge held to be good, and refused to hear the case. Upon motion for a *mandamus* to compel him to hear it:

Held, that the particulars of claim was sufficient, and the writ was granted accordingly. *Heslop v. McGeorge*, 570

#### JUDGE.

A judge of a County Court having pronounced his decision upon a case before him, which decision was recorded by the clerk in the register book, the judge, after the parties had left the court, rescinded that decision, adjourned the matter to the next following court, and gave notice to the parties that he had done so, and requested them to attend accordingly. The defendants, for whom the judgment was given on the first occasion, attended, and protested against a further hearing, on the ground that it had been decided before in their favour. The judge proceeded, notwith-

standing, and reversed his former decision, and caused a plea of the Statute of Limitations to be pleaded and omitted, without days' previous notice having been given of an intention to plead that plea, as the 19th rule of practice. On behalf of the defendants it was sworn that they had appeared to the first judgment so given and was not rescinded on the same day at the same court, but subsequently there that not being expressly denied by a verified copy of the record or register only being produced, whereby it appeared to have been done on the same day.

Held, insufficient, and that *mandamus* must issue. *Jones v. Jones and another*, 106  
The judge of the County Court has a discretion, from which there is no appeal, upon all questions of law and fact within his jurisdiction. A question as to the validity of a summons under the 11th rule of practice is, therefore, entirely for the consideration of the judge, and the court will not interfere where he appears to have exercised such a discretion, even although the summons had not been duly served. *Semle*, that the jurisdiction of the County Court proceeds from the cause of action, and if that be within the jurisdiction, subsequent proceedings cannot be set aside by this court. *Zohrab v. Smith*, 106  
The Lord Chancellor is empowered to appoint the same person to be the judge of several more County Courts, under the County Courts Act, to be holden in several districts of which the appointee is to be sufficient. *Reg. v. Parkam*, 263  
A judge of a district County Court, exercising jurisdiction under stat. 9 & 10 Vict. c. 95, is liable in an action of trespass for false imprisonment, if he takes an act done by his command and when he has no jurisdiction, through the taking of law.

A commitment being made with jurisdiction, the defendant must be taken to be aware of the want of jurisdiction, and is therefore, liable.

In pleading the general issue, the plea must be stated to be "by the defendant." *Houlden v. Smith*, 303  
There may be corruption without malice, and there may be a misdemeanor or a bad motive without malice, or without a pecuniary advantage. A wrong committed with a bad motive is corrupt.

Upon the facts, as stated and the court acquitted Mr. Amos of the charge of corrupt and oppressive conduct in the discharge of his duties.



requent sittings of the County Court should be holden, so as to prevent so much accumulation of business in one day. It is wholly contrary to law, and the practice should not be allowed by the judges of the County Courts, for an attorney to practise in the County Courts as an advocate, taking cases for other attorneys. *Reg. v. Andrew*, 466

Power of a judge to exempt a judge from the duty of issuing a subpoena, but the Superior Courts regulate the practice of subpoenaing County Courts to produce their evidence of what took place before them on any point of any point. *Reg. v. Dutton*, 482  
 Power of a judge of a County Court, after hearing the facts of a case, nonsuits the plaintiff on the ground that he has not proved his case, that is such a decision on the merits of the case that this court will not interfere by appeal, even though the judge was in error in his view of the law.

When a company is formed, and afterwards agreed that the purposes of the company shall be changed from their original objects, that will not entitle a dissentient shareholder to recover back his deposits in an action. *Filmer v. Rhoden*, 532

Under 10 Vict. c. 95, s. 18, the Lord Chancellor has power to remove from his office a County Court judge, on the ground of his incapacity or misbehaviour; and where the plaintiff against has had a fair opportunity of being heard, where the charges, brought against an inability or misbehaviour, and evidence has been given in support of them, this court cannot inquire upon appeal into the amount or balance of the account, and will not grant a *quo warranto* writ, but the mere question of fact may be tried at a jury. *Ex parte W. Ram*, 589

INDEX; JURISDICTION.

## JUDGMENT.

Will not set aside a judgment obtained by the negligence of defendant's attorney, upon appeal, of costs of the day, without a rule nisi, cause obtained on production of a *pro* affidavit. *Anonymous*, 65

INDEX; SUGGESTION.

## JUDGMENT—ACTION ON.

When brought in a Superior Court for judgment, and the defendant allowed to go by default. The plaintiff on the judgment for the debt and costs (see in all 201.) for the purpose of execution against the defendant's

person. To this action there was a false plea of *non tiel* record.

Held, that in such a case the court will exercise its discretion under 43 Geo. 3, c. 46, in favour of the plaintiff.

Held also, that the 129th section of 9 & 10 Vict. c. 95, does not apply to cases of judgment by default. *Slater v. Mackay*, 346

## JURISDICTION.

Where an action had been commenced in the Superior Court after the passing of the 9 & 10 Vict. c. 95, but before the day on which the County Court was constituted under the provisions of that statute:

Held, that the 129th section, which enacts that "if any action shall be commenced after the passing of this act in any of Her Majesty's Courts of Record" for any cause that might have been brought in the County Court the plaintiff should be deprived of his costs, was not applicable to the case in question, inasmuch as there "was no court holden under the statute" in which the plaintiff could have sued at the time of his bringing the action. *Harris v. Lawrence*, 43  
 Will an action lie in the County Courts upon a judgment obtained in the Superior Courts, *quære?*

Can such a judgment be proved by an examined copy of the record, or must not the record itself be produced, *quære?* *Peirce v. James*, 45

Where a statute had authorized the levying of a church-rate for a specific purpose, and enacted that the occupier or tenant should pay the rate in the first instance and deduct it from the rent; and that "every such landlord should allow such deduction accordingly, notwithstanding any agreement to the contrary," and a lease was produced having such an agreement:

Held, that this was not a matter "in which the title to any corporeal or incorporeal hereditaments" was in question, under the 58th section of 9 & 10 Vict. c. 95, so as to take an action for the recovery by the tenant from his landlord of a rate so paid out of the jurisdiction of the County Court. *Gwynne v. Knight*, 47

Action on a judgment, where judgment roll of a Superior Court showed a debt of 40*l.*, and there was no *remittitur*, but final judgment for 17*l.*, for which an action was brought in the County Court.

Held, that this was a good judgment for 17*l.*

But, whether an action will lie in the County Court upon a judgment obtained in a Superior Court, *quære?*

*Semble*, that if a judge of the County Court should receive proof of such judgment

as evidence of the debt, this court will not interfere, it being within the jurisdiction of the judge. *Winsor v. Dunford*, 90

A summons was issued in the County Court against the defendant, and served at a place where defendant was not known; proof of the service was accepted by the judge, and in defendant's absence the plaintiff was heard and obtained judgment, and thereupon execution issued. The first intimation defendant had of any such action being brought was the appearance of the bailiff to levy. The defendant applied to the judge of the court from which execution had issued for a new trial, which the judge consented to grant upon terms that defendant should undertake to appear and defend the action on its merits, and to bring no action against the officer. This the defendant refused, but applied to the Superior Court for a prohibition.

Held, that the County Court has jurisdiction wherever due proof is given of the service of the summons: that the question of what is due proof is exclusively in the discretion of the judge, from which there is no appeal to this court, and that, therefore, not being a question of jurisdiction, it cannot be entertained, nor can a prohibition be allowed.

Whether prohibition would lie after execution, *quære?* *Robinson v. Lenaghan*, 97

A County Court, under the 9 & 10 Vict. c. 95, has jurisdiction in an action on a judgment obtained in a Superior Court, when the amount claimed thereunder does not exceed 20*l*. *Winsor v. Dunford*, 132

A prohibition being applied for to the Court of Chancery to restrain a judge of a County Court from carrying into execution a judgment obtained therein concerning the title to land, and the judges of the Common Law Court being all (except the judge at chambers, who has no jurisdiction in such a case) on circuit:

Held, that this court has jurisdiction to issue a prohibition to the County Court judge out of the Petty Bag Office, and a prohibition was in this case accordingly issued. *Wright v. Cattell*, 433

The Great Northern Railway Company's Act (13 & 14 Vict. c. 51, s. 13), provides that the company, "with respect to the conveyance of goods and minerals, may lawfully demand and receive as their maximum rate of charge for the conveyance thereof along their railway, including the tolls for the use of the railway and trucks, and locomotive power, except (among other things) a reasonable sum for warehousing and wharfage, for every carriage, fourpence-halfpenny a mile; and the company shall not be compelled to provide waggons and carriages

for the conveyance of coal," &c. the 16th section, the company "at all times to provide sufficient power, and to convey all merchant empty waggons, matters and th and along their railway."

The plaintiff requested the o convey several of his trucks, lads along a portion of the line, but th first demanded a certain sum per returned empty carriages, which t refused to pay, alleging they o conveyed back free. Several trs been delayed in consequence of th the plaintiff brought a plaint in t Court for damages accrued by rea conduct of the company; and, standing an objection to his jurisd judge tried the cause, giving judg plaintiff's favour.

On motion for a prohibition, un Vict. c. 95, s. 58, on the ground t tion of title to "tolls" was inv that, therefore, the County Cou jurisdiction:

Held, that title to "tolls," as the County Court Act, was not be tion; and, therefore, as the j jurisdiction, prohibition would not v. *The Great Northern Railway* 447

Where the plaintiff's account exceed of the County Court jurisdiction sought to bring it within, by agreement that cross-accounts wer off between him and the defendant (the defendant being sued as exec the judge of the County Court pr that view of the case, and four plaintiff, but there was no eviden binding agreement to that effect, granted a prohibition to restrain proceedings in the County Court. v. *Franklin*, Executor, &c. 497

It appeared by the plaint and partic action in the County Court, that th action was stated to be for "having the wife of the plaintiff, and n charged her with stealing a shawl,"

Held, that this was a proceeding licious prosecution, and not an ass that prohibition ought to go.

*Carrey*, 521

A summons stated the cause of acti following terms:—"For that y assaulted the wife of the plaintiff, and maliciously caused her to be v charged with stealing, &c., and to veyed through the streets and to l up and detained in custody, &c., the plaintiff was put to expense

tnesses and other persons in clear-laintiff's said wife from the said assault and charge," &c. Partic-e annexed in terms similar to the claiming for damages a sum of

hat this was an action for a mali-secution, and, by sect. 50 of the orts Act, the County Court had-tion to entertain it. *Jones and urrey and Wife*, 559  
eaman's wages, which involved a f the master's right to disrate the had been adjudicated upon by a he peace, under stat. 7 & 8 Vict. 5. The claimant did not draw up e magistrate's order;  
at a judge of a County Court was fusing to try an action of debt for e of wages brought in respect of atter. *Reg. v. Pollock*, 585  
RENT JURISDICTION; JUDGE;

#### JURY.

dant had demanded a jury, but ad not, and at the hearing defend-ered to abandon his demand, but jected, and desired a jury:  
hat plaintiff could not demand nless he also had given notice of nd. *Bailey and others*, Assignees, 1cock, 56

#### LORD AND TENANT.

ne, c. 14, which gives to landlords claim for rent over an execution not repealed by the 107th section unty Courts Act, 9 & 10 Vict. rr v. Reid, 53  
vied. The landlord served notice 15l. for one year's rent. There goods in defendant's house, but did not make another levy; the f the sale of the goods seized were ourt, and an interpleader summons out by the landlord.  
at after notice of rent due, it is f the bailiff to make a further levy, re execution is to be satisfied out eeds of the first levy, and the rent e of the second.  
ider is no exception to the rule sts of litigation should abide the issold and another v. Jefferies, 72 ing unreasonable in a custom that d should be liable to the outgoing . farm for a certain proportion of as incurred in draining, whether

the expenses were incurred with the landlord's consent or not, if they were incurred properly and according to the rules of good husbandry. *Mousley v. Ludlam*, 577

#### LOCAL COURT.

In the Court of Kingston-upon-Hull, an action of *assumpsit* had been brought, and the declaration stated that defendant was indebted to plaintiff within the jurisdiction of the court, for freight due and payable from defendant to plaintiff, for the carriage of goods from Marseilles to Kingston-upon-Hull, and there delivered to defendant within the jurisdiction aforesaid, at defendant's request.

Held, that the delivery was the considera-tion for the promise, and that both the con-sideration and the cause of action were within the jurisdiction of the court. *Kemp v. Clark and another*, 190

#### MALICIOUS PROSECUTION.

See JURISDICTION.

#### MANDAMUS.

See JUDGE.

#### MASTER AND SERVANT.

The audit clerk of a railway company, under an agreement for 140l. a year, determinable by three months' notice, or payment of three months' salary, was improperly dismissed without notice; and being sued by the company for moneys in his hands belonging to them, claimed to set-off the three months' salary to be paid under the agreement for an improper dismissal without notice.

Held, that he was entitled to set it off.

Held, also, that the question whether the cause alleged for the dismissal, viz., the disclosure, to the prejudice of his employers, of facts acquired by virtue of his employment, was a question of fact, and not the subject of appeal under the County Court Extension Act.

*Quære*, whether the decisions, of a County Court judge, in cases where there is no jury, upon a question of fact mixed up with law, is the subject of appeal under the County Court Extension Act. *The East Anglian Railway Company v. Lythgoe*, 380

#### NEW TRIAL.

An application for a new trial must be made upon an affidavit of the facts, and notice



ved that the bill had been drawn sed within the jurisdiction of the ourt in the district of which the resided, but the notice of dishonour given in another district.

at the cause of action arose in a int within the jurisdiction of the ourt, and leave was given to enter n to deprive the plaintiff of costs.

*Buck*, 236

caler, whose duty it is to affix the to instruments, and who attends hancellor for that purpose some- estminster Hall, sometimes at the Lords, and sometimes at Lincolns' who at other times attends at the l Patent Office in Quality-court, lane, is not a person who carries iness in any definite locality so as led to enter a suggestion under Courts Act.

whether the performing the duties office is a carrying on of a business t statute? *Betteley v. Buck*, 267 the Board of Admiralty in the gister Office of Seamen, No. 70, mes-street, is not a person carrying iness in the city of London within g of 10 & 11 Vict. c. 71, s. 113.

that the words "carrying on his mean a carrying on of an inde- siness. *Buckley v. Hans*, 269

a plaint in a County Court to l. for damages done to his field by e kilns of B. during the period mber 10, 1843, to October 30, 1849. it having been removed to this ertiorari, on the ground that the were of greater value than 20*l.*, B.'s property in them would be f A. were to succeed, A. entered laint in the County Court for 5*l.* me cause of action, laying the the injury to be from November o November 30, 1849.

at the County Court had jurisdic- ertain the second plaint, and that, rohibition would not lie, and that i could not issue, as the cause of not exceed 5*l.*

ill be allowed to the successful ough the other party has been o impropriety, as the object of em is to reimburse the successful not to punish the other. *Ed- logers*, 279

s entered in a County Court to l. penalty for practising as an .

The particulars stated the cause hus: "Action to recover 20*l.* for — and on divers other days and

times the defendant did act and practise as an apothecary, &c., at A. in the county of C., A. in the county of N., B. in the county of C., and B. in the county of N., by then and there attending on E., F., G., and H., whereby he has forfeited 20*l.*" &c.

Held that such particulars did not disclose a cause of action exceeding 20*l.*, and that, therefore, the County Court had jurisdiction.

*The Apothecaries' Company v. Burt*, 281

In December, 1847, an order was made by a judge of a County Court, under sect. 60 of the 9 & 10 Vict. c. 95, for suing the defendant, who was then residing out of the jurisdiction. It did not appear whether thereupon any summons issued, but in January 1850, a summons in an action in which the same parties were plaintiff and defendant issued and was served, together with the before-mentioned order upon the defendant, who was then residing out of the jurisdiction. Upon this the defendant gave notice, as provided for by sect. 76, of his intention to plead the Statute of Limitations; but, before the day of trial, he moved this court for a writ of prohibition, on the ground that the County Court had no jurisdiction, there being no valid order to support the summons:

Held, that whether or not the order of 1847 was sufficient to support the summons in 1850, the defendant had waived the objection by appearing and giving notice of his plea.

*Quære*, whether an order for leave to issue a summons into a foreign district must be founded on a plaint already entered? *Jones v. James*, 290

One of the rules of a Building Society, duly enrolled under the 6 & 7 Will. 4, c. 32, provided that all matter in dispute should be referred to two of Her Majesty's Justices of the Peace, according to the provisions of 10 Geo. 4, c. 56, s. 27.

Upon a motion for a *mandamus* to the judge of one of the County Courts to proceed and hear a plaint brought by a member of the society against one of its officers:

Held, that sect. 4 of 6 & 7 Will. 4, c. 32, incorporating the provisions of 10 Geo. 4, c. 56, ss. 27, 28 and 29, and the above-mentioned rule, took away the right of action. *Ex parte Payne, Re Payne v. Garratt*, 311 A clerk in the office of Privy Council residing in another district does not "carry on his business" at the Privy Council Office within the meaning of the County Courts Act, so as to bring him within the jurisdiction of the court of the district in which the office is situate.

The court will not take judicial notice of the situation of the Privy Council Offices.

It should be stated in the affidavit. *Sangster v. Kay*, 328

A., who was a remote indorsee of a bill of exchange, sued B. the drawer, and recovered less than 20*l.* Upon a motion to enter a suggestion to deprive the plaintiff of costs:

Held, that the giving of notice of dishonour was a material point in the cause of action, and as the plaintiff and defendant lived within twenty miles of each other, the cause of action in a material point arose within the district, and the defendant was entitled to have a suggestion entered. *Heath v. Long*, 534

A writ of prohibition, issued *ex parte* out of the Petty Bag Office and setting forth no grounds for prohibiting the proceedings, is void, and will be set aside on motion. *Still v. Booth*, 359

An action was brought in the County Court for the balance due upon some bills of exchange, the full amount of which would exceed 20*l.* At the trial, the defendant contended that the judge had no jurisdiction, inasmuch as the plaintiff had no right under the circumstances, to treat his claim as a balance; the judge, however, thought that he had. Upon a rule for a prohibition,

Held, that as the question of jurisdiction involved the whole merits of the case, it being, in fact, whether there was a balance or not; and as the judge clearly had power to enter into the facts which raised that question, and as the affidavits were conflicting, this court would not interfere with the judgment of the judge of the County Court.

This court will not review the decision of a judge of the County Court, even upon a question of jurisdiction, where it is possible that the judge may have come to a right conclusion. *Joseph v. Henry*, 366

An action having been brought in the County Court demanding 20*l.* for damages done to certain premises by lime kilns of the defendant, the plaint was removed by *certiorari*, on the ground that inasmuch as the value of the lime kilns would be destroyed if the plaintiff were to obtain a verdict, and that they were worth more than 20*l.*, the cause was not within the jurisdiction of the County Court. A second plaint was then brought demanding 5*l.* for the same injury, but stating it to have accrued between a longer period of time. At the hearing the defendant pleaded in abatement that the former suit was pending, but the judge proceeded to hear the cause. On motion for a prohibition, it was

Held, that a prohibition would not lie to restrain the judge from proceeding with the second action. *Edwards v. Rogers*, 373

Goods were ordered by defendant at plaintiff's shop to be sent by railway to defendant's residence. The goods were at the railway, and by the railway conveyed to the defendant. Neither plaintiff's shop nor the railway station was in the A. district of the County Court, in which the defendant's residence was situated:

Held, that the cause of action arose in any material point within the A. district. *De Porquet v. Bury*, 431

Where a plaintiff in the County Court obtained a judgment, and execution was levied, and a levy made by the bailiff of the county who seized the goods of the plaintiff in action, who thereupon brought suit in trespass against the plaintiff in the County Court:

Held, that the act was that of the court, and that the action, maintainable at all, could only be brought against such officer. *Bryant v. Haigh*. Under ss. 38 and 39 of the 9 & 10 c. 95, it is competent to the Lord Treasurer, in dealing with claims for compensation under those sections, to determine, under all the circumstances, whether, under all the circumstances, the applicant is a loser or gainer by the act, and if the latter, to refuse to grant any compensation.

Therefore, where an applicant for the offices of registrar and clerk of the court was abolished by the statute, but by the virtue of the statute, clerk of the court established under it, for which first paid by fees, and afterwards salary, and failed to show that he had, in fact, sustained any loss by the change.

Held, that he was entitled to no compensation under s. 38 or s. 39 of this Act. *Re James Wright*, 392

After prohibition issued, the judge proceeded and committed defendant to prison, and payment of instalments, in pursuance of order upon a judgment.

For this an action was brought against him for false imprisonment, and it was held by whom it was tried charged the judge, if the defendant, in making the order, acted under a *bonâ fide* belief that he was a judge of the County Court, that it was incumbent on him to do so, notwithstanding the prohibition that had issued, that the order must be considered as done in pursuance of the statute, and that he was entitled to notice of action under the provisions of the 138th section of the County Court Act:

Held to be a right direction; and was for the jury to say if the judge

sued he was so bound to proceed, if "reasonably" meant anything, it was used in contradistinction to the clerk and bailiffs of a Court stated that the action would not be supported in the Court of Common Pleas: it would not support an action in the Court of Queen's Bench.

Notice was for breaking plaintiff's door and taking furniture therein without claiming the furniture as belonging to the plaintiff:

That it would not support an action in the plaintiff's house, and for the goods.

The notice should state the special facts on which it is to be claimed in the declaration.

If execution issues from the Court against the goods of A., and the goods of B. are taken, and his house is by mistake, the clerk and bailiffs are, 10 Vict. c. 95, s. 138, entitled to an action. *Estob v. Wright and* 7

#### PARTICULARS OF DEMAND.

If demand are not necessary under a writ, they may be given with a summons in an action on a promissory note. *Ennett*, 52

It is not necessary for goods sold and delivered that the summons should state the particulars of the work and labour done: that the summons and particulars should be explained to the defendant, and may be used to explain the action. *Lane v. Hobbs*, 64

Particulars must be consistent with the action stated in the summons.

Where the summons claimed a debt for goods sold and delivered, and the goods were for work done, and costs of the action, it was held to be insufficient. *Williams*, 67

#### WRIT OF HABEAS CORPUS.

#### PARTNERSHIP.

See JURISDICTION.

#### PAUPER.

Having sued as a pauper in the County Court, and recovered less than 20*l.* on contract, the sum being within the jurisdiction of the County Court: at defendant was entitled to a suggestion. *Stone v. Smith*, 300

County Courts have jurisdiction to allow persons to sue in their own names as paupers, and in cases within

their jurisdiction paupers must sue in the County Courts, or, upon motion for a suggestion, they will be deprived of costs. *Chinn (a pauper) v. Bullen*, 315

#### PAYMENT INTO COURT.

The plaintiff recovered 18*l.* by verdict, and took out of court 7*l.* 15*s.* paid in on a plea of tender:

Held, that the plaintiff, having recovered more than 20*l.* by virtue of the action, was not deprived of his costs by the 13 & 14 Vict. c. 61, s. 11. *Cross v. Seaman*, 534

#### PAYMENT OUT OF COURT.

Where plaintiff accepts payment out of Court, and does not give notice thereof to the clerk, and the cause is called on in due course, judgment will be given for the defendant. *Simon, Gent., v. Watts*, 33

#### PENALTIES (ACTION FOR.)

See JURISDICTION.

#### PERJURY.

An indictment for perjury averred that "on, &c., in the Whitechapel County Court of Middlesex, holden at the Court-house in Osborne-street, Whitechapel, in the parish of, &c., in the County of Middlesex, before J. M., serjeant-at-law, then and there being judge of the said court, a certain action on contract, then pending in the said County Court, between A. L., suing as widow and executrix of H. L., plaintiff, and R. H., defendant, came on to be tried, and was then, in due form of law, tried and heard before the said J. M., &c.; upon which trial the said A. L., &c., tendered herself as a witness on her own behalf, and was duly sworn, &c., before the said J. M., then and there being judge of the said court as aforesaid, and then and there having sufficient and competent authority to administer the said oath to her," &c.:

Held, upon writ of error, first, that the court was sufficiently designated as a court held under stat. 9 & 10 Vict. c. 95; and, secondly, that although there was no express averment that the oath was administered in a judicial proceeding over which the court had jurisdiction, that averment was, by necessary intendment, involved in the allegation that the judge had sufficient authority to administer the said oath. *Lavey v. The Queen*, 562

#### PLAINT.

This Court has no power to reinstate a

plaint after it has been struck out. *Madocks v. Phillips*, 37

#### PONTEFRACHT HONOUR COURT.

The jurisdiction of the Court Baron of the Honour of Pontefract was extended by 17 Geo. 3, c. 15, which recognised its ancient right of granting replevins. The 2 & 3 Vict. c. 85, further extended the jurisdiction under the title of the Court of the Honour of Pontefract, and provided that six months after the passing of any general act for the recovery of small debts, the operation of which should interfere with the powers given by that act, that act should cease and determine, and the 9 & 10 Vict. c. 95, gave power to Her Majesty to appoint County Courts, and repealed all acts affecting the jurisdiction of such courts:

Held, that the construction of these statutes was to destroy the newly-constituted Court of the Honour of Pontefract. That the old court being previously put an end to, was not revived by the subsequent act, and therefore that no power remained to grant replevin.

Certain cotton spinning machines were fixed by means of screws, some in wooden fastenings, and some fixed in stones with molten lead, and thereby fastened to the building. The machines were distrained for rent, and subsequently replevied:

Held, that they were not a part of the freehold, but were properly distrainable. *Halliwell v. Eastwood*, 452

#### PRIVILEGE.

See ATTORNEY.

#### PROCESS (SERVICE OF.)

To an action of trespass for false imprisonment, the defendant pleaded a justification under process out of a County Court in a suit there by the defendant against the plaintiff. It was proved that the defendant, having a debt due from one W. I., sent a bill by a messenger, who, by mistake, delivered it to the plaintiff. A plaint was afterwards entered in the County Court against W. I., by name, and a summons issued against W. I. by name; but that summons was also served upon the plaintiff. Upon proof of service, judgment was obtained *ex parte* against W. I. by name, and afterwards another judgment summons was issued against W. I. by name, and, on non-appearance an order was made for committal of W. I., by name. All the proceedings were served upon the plaintiff (who throughout informed those who served him that he was not W. I.) by direction of defendant.

Held, that the plea was not good much as the process had been issued against the defendant against W. I., and that the defendant issued the against the plaintiff was material, contrary to the fact.

Held also, that as the process executed against the plaintiff by the defendant, he was responsible in *Walley v. McConnell*, 257

#### PROHIBITION.

The Court cannot interfere by prohibiting the proceedings of a County Court suggestion that the judge has decided a question of law which is his jurisdiction.

This court will interfere only in inferior court acts without or beyond jurisdiction. *Toft v. Rainer*, 39

Prohibition will not issue after judgment execution, in a case where the defendant does not appear on the face of the process. *Ackworth and another v. Dowsett*, 1

Prohibition will not be granted to prevent entry of the judgment of the Court shows that a set-off was allowed sent." *Winsor v. Danford*, 132

The defendant was sued in the Court under sect. 122 of the 9 & 10 Vict recover possession of some premises. At the trial, the judge nonsuited the defendant with leave to move at the next court. The defendant set aside the nonsuit, no leave (sworn) being reserved to enter a verdict for the plaintiff. In due time before court-day the defendant received through the post that the plaintiff applied to set aside the nonsuit and a verdict for the plaintiff. The defendant did not attend in pursuance of the notice, he was afterwards served with a notice to attend. The court had set aside the nonsuit and directed a verdict to be entered for the plaintiff. Upon an application for prohibition to restrain the judge from proceeding upon his judgment:

Held, that as the defendant having received the notice of motion to set aside the nonsuit, he ought to have attended that court and opposed the application, and that not having done so, he was not entitled to a prohibition. *Croze*, 153

A party is not entitled to a writ of prohibition at the trial in the court below, he can only apply in the proceedings, and the proceedings themselves are correct upon the face of the record. *Yates v. Palmer*, 314

A prohibition issued out of the Pet



h upon its face appears to be  
l contains a good ground for  
will not be set aside though  
rte. *Swain v. Cox*, 362

TION.

#### LOWAY COMPANY.

or not duly delivering goods at  
ed that when the goods were re-  
e office-keeper of the defendants,  
ected for C., the plaintiff wished  
arriage for the entire journey;  
ce-keeper said that he could not  
money, as he had no rates of pay-  
greater distance than N., where  
its' line joined another railway,  
things would go well enough.  
rived in the regular course at N.,  
afterwards delayed upon their  
ween N. and C.

t as the office-keeper, being the  
company, had not expressly  
liability, they were responsible  
er delivery of the goods at C.,  
*Muschamp v. The Lancaster and*  
*Leeds Railway Company* (8 M.  
*Watson v. Ambergate, Notting-*  
*ham Railway Company*, 495

sted an excursion ticket in the  
m;—"Barnsley to King's-cross,  
Excursion ticket, to return by  
advertised for that purpose on any  
ond fourteen days after the date  
t the Barnsley station a bill was  
unannouncing the hours of depar-  
sion trains from Doncaster and  
The Railway Company's line  
London to Doncaster; and from  
nother railway conveyed passen-  
sley. The plaintiff, within the  
l, presented himself for con-  
n London to Barnsley by one of  
advertised; but was refused for  
n; on the evening of the same  
conveyed to Doncaster by another  
tised trains; but the next day,  
y, there was no train to carry  
Doncaster to Barnsley.

t the company had broken their  
h the plaintiff, first, by refusing  
by the earlier train; secondly,  
ing him on from Doncaster to  
*The Great Northern Railway*  
pps., v. *Hawcroft*, Resp., 597  
rier for hire received a horse to  
from A. to B. At the time of  
of the horse, the owner was re-  
n a ticket, which, after stating  
paid for the conveyance of the  
e termini of the journey, con-

tained the following words:—"This ticket  
is issued, subject to the owner's undertaking  
to bear all the risk of injury by conveyance  
and other contingencies; and the owner is  
required to see to the efficiency of the car-  
riage before he allows his horses or live stock  
to be placed therein. The charge being for  
the use of the carriages and locomotive power  
only, the company will not be responsible for  
any alleged defects in their carriages unless  
complaint be made at the time of booking,  
&c., nor for any damage, however caused, to  
horses, cattle, or live stock of any description  
travelling upon the railway, &c. I have  
examined the carriages, and am satisfied  
with their sufficiency, and safety." Then  
followed the signature of the owner:

Held, that this was not a mere notice which  
would be void under sect. 4, but a special  
contract within the 6th section of the Car-  
riers' Act (11 Geo. 4 & 1 Will. 4, c. 68),  
and protected the carrier from liability for  
damage done to the horse through his neg-  
ligence in the course of its journey. *The*  
*Great Northern Railway Company*, App.,  
*Morville*, Resp., 616

#### RECOVERY OF TENEMENT.

Where a house and land were demised by the  
same landlord to the same tenant, at an entire  
rent of 96*l.* but the tenancy of the house  
commenced at a different period from the  
tenancy of the land:

Held, that they could not be served for  
the purpose of suing in this court for the re-  
covery of a tenement the value or rent of  
which does not exceed 50*l.* per annum,  
under sect. 122 of the County Courts Act.  
*Winn v. Guest*, 66

Where a tenant appeared to a summons under  
the 122nd section of the County Courts Act,  
and stated some "cause to the contrary"  
which the judge considered to be insufficient:

Held, that the term "show cause" means  
such cause as, in the opinion of the judge,  
constitutes a defence, and that is a question  
within his jurisdiction.

A good notice to quit being necessary to  
determine the tenancy, and it being con-  
tended that this was necessary to give juris-  
diction, and that, in the present case the  
notice was bad:

Held, that the sufficiency of the notice to  
quit, and the consequent determination of  
the tenancy or otherwise, was a question  
wholly for the consideration of the judge,  
and within his jurisdiction. *Fearon v. Nor-*  
*val*, 127

If the rent of premises do not exceed 50*l.*  
per annum, the County Court has jurisdic-  
tion, under sect. 122 of the 9 & 10 Vict.

c. 95, though the annual value is greater than that amount.

Upon the hearing of a plaint under the foregoing section, the County Court pronounced judgment in favour of the landlord, directing possession of the premises to be given up at a certain day several months after. The landlord, treating this judgment as a nullity, from its not being conformable to the act and the rules made under it, declined to act upon it, but commenced another action, and again recovered judgment.

Upon a motion for a prohibition, moved upon the ground that a prior judgment, unreversed, was pending:

Held, that, as the first judgment was a nullity, the landlord was justified in treating it as such, and in commencing a fresh action.

*Fearon v. Norval*, 174

The 122nd section of the County Courts Act, contemplates the ordinary relationship of landlord and tenant, and not that of mortgagor and mortgagee. *Jones v. Owen*, 176

Where the property itself is situated out of the jurisdiction of the County Court, proceedings cannot be taken there for the recovery of possession under sect. 122 of the County Courts Act, although both plaintiff and defendant are residing within the jurisdiction.

*Ellis v. Peachey*, 241

A. entered into a written agreement with B. to take certain premises at a rent of 20s. a week, payable on demand, four weeks' notice by either party to be a valid and legal notice: subsequently the rent was reduced by a verbal arrangement to 16s. a week: and a plaint was afterwards entered in the County Court, under the 122nd section of the County Court Act, to eject the tenant. It was sworn by the tenant that the yearly value was more than 50l.

Held, that the verbal arrangement did not discharge the original agreement; that there was no fresh demise; and a writ of prohibition was granted accordingly to restrain the proceedings in the County Court.

*Crowley v. Vitty*, 582

*Certiorari* does not lie for. A question of title is not necessarily involved in a plaint for.

*Price v. Price*, 333

#### REPLEVIN.

The County Courts have jurisdiction in, although the sum in dispute exceeds 20l.

*Re County Court of Lancashire*, 91

The declaration on a replevin bond set forth that A. H. levied his plaint in a County Court held under 9 & 10 Vict. c. 95, against the present plaintiff, and a judgment by that court that A. H. should take nothing by his

writ, *prout petit*, &c. Plea, *in* and issue thereon. A minute of findings of the County Court was stated that the case had been for want of jurisdiction, on the disputed title having been sworn.

Held, that as this entry did the averment in the declaration that the defendant was entitled to judgment.

*Stanhope*, 105

In replevin the County Court has although the damages are laid and it is no ground for a prohibitory verdict is given for damages above. *Re the County Court of Lancashire* Application for *certiorari* to remove to a judge in chambers in the fifth *Bowen v. Evans*, 207

A replevin bond conditioned for the plaintiff appearing at the next County Court to be holden at, &c., that not being Court holden under the 9 & 10 Vict. c. 95, and then and there to prosecute effect, is insufficient since that a

Notice being given to produce and the defendants declining to do so when called for, a copy obtained of the defendant's declaration was put in by the plaintiff. The defendant produced the original.

Held, that the plaintiffs were to have the copy read, and that they could not insist on the bond being proved by the attesting witness.

Held also, that the whole amount of rent distrained for was recoverable.

An averment in the declaration said County Court had not, at the taking of the said bond, any to hear or determine any action is a sufficient allegation after a writ had not jurisdiction at the time to the sheriff. *Edmonds v. Chalmers*

To obtain a writ of *certiorari* to remove the declaration of replevin, it is required by section of the 9 & 10 Vict. c. 95, that a declaration should be made that the thing is corporeal hereditament, &c., is or that the rent in respect of which distress had been taken was more than 20l. and also that a bond should be taken into, with sureties to be approved by the clerk of the court, to prosecute the effect, and without delay, and to pay the court by which the suit was brought that such title was in dispute, or was ground for believing that the thing or damages was more than 20l.

Held, that it is not necessary that conditions should be complied with in applying for a *certiorari*.

Held, also, that the 13 & 14

apply to actions of replevin.  
us, 445

# RULES.

struction of, 604

## SEAMEN'S WAGES

CTION.

## SHERIFFS' COURT.

or commissioner of the Sheriffs'  
London has no power to certify  
e County Courts Act, sect. 129,  
ction was fit to be brought in any  
ajesty's Superior Courts of Record.  
v. *Oppenham*, 238

## SET-OFF.

f brought his action in a Superior  
inst the defendant for, and proved a  
more than 20*l*. There were cross  
between the parties, which had not  
need. The defendant pleaded and  
set-off, which reduced the plaintiff's  
ow 20*l*., and the verdict passed ac-  
. A rule nisi having been obtained  
: 10 Vict. c. 95, s. 129, for leave to  
uggestion upon the roll to deprive  
iff of his costs, on the ground that  
to have sued in the County Court:  
hat the case did not come within  
*Woodhams v. Newman*, 231

## TING DEMANDS.

## EBTS ACT, 8 & 9 VICT. c. 127.

f commitment by the judge of the  
Court in London, under s. 1 of  
t. c. 127, recited that T. K. "of  
, &c. in the city of London," being  
&c., and then being at Fleet-lane,  
within the jurisdiction of this court,  
noned, &c., and having appeared,  
ed to pay by instalments of 2*l*. per  
d that the first instalment had not  
; and then ordered the said T. K.  
risoned in the debtors' prison for  
London, "being the city in which  
K. hath been resident:"—  
Held, on return to a writ of *habeas*  
Patteson and Coleridge, JJ., after-  
firmed by the Court of Common  
at the warrant was had because it  
ate that the debtor had been sum-  
show cause against his committal.  
nman, C. J. and Erle, J. *dissen-*

Held (*Patteson, J. dissente*),

that the statement of residence was sufficient,  
—first because the act of Parliament inten-  
ded a committal to the gaol of the district  
which had original jurisdiction in the matter,  
and not of that in which the debtor resided  
at the time of commitment; and secondly,  
because, if not, still the words "hath been  
resident" imported a continuance of resi-  
dence up to the time of the commitment.

*Ex parte Thomas Kinning*, 1

Under 8 & 9 Vict. c. 127, s. 1, which provides  
that a debtor against whom a judgment has  
been obtained may be summoned before any  
one of certain inferior courts, and that if he  
appears to have the means of paying by in-  
stalments, and shall not pay at such times as  
the court shall order, the judge may commit  
him for any time not exceeding forty days:

Held, affirming the decision of the Court  
of Common Pleas, and the judgments of  
*Patteson and Coleridge, JJ.*, that a summons  
to show cause why the debtor should not be  
committed is necessary previous to the com-  
mittal. *Erle, J.*, and *Martin B., dissenti-*  
*tibus.*

In trespass for false imprisonment, the  
defendant pleaded that W. T. recovered a  
judgment against plaintiff: that the plaintiff  
was summoned before an inferior court under  
8 & 9 Vict. c. 127, s. 1, when an order was  
made for payment by instalments: that  
plaintiff made default, which, being proved  
before the said court, the judge duly and  
according to the form of the statute, and at  
the request of the defendant, the attorney of  
W. T. acting upon his retainer, ordered the  
plaintiff to be committed to prison for forty  
days; that the defendant, as such attorney,  
delivered the warrant to an officer to be  
executed, who arrested the plaintiff and de-  
tained him in prison.

Replication, that the said judge did not  
order that the plaintiff should be committed  
*modo et formâ.*

Held, reversing the decision of the Court  
of Common Pleas, that the traverse in the  
replication put in issue the fact of the making  
of the order of committal only, and not its  
validity.

*Quare*—Whether, although the plaintiff  
below was entitled to his discharge on *habeas*  
*corpus*, he can sue under the circumstances  
in trespass for an erroneous order of the judge.

But if he can, the attorney of the party is  
liable for ordering the warrant of the judge  
to be put in execution. *Buchanan, plaintiff*  
*in error, v. Kinning, defendant in error*, 504

## SMALL DEBTS COURT.

An inferior Court of Record, the jurisdiction  
of which is not limited as to amount, though

it is as to locality, is not "a court for the recovery of small debts" within the meaning of 7 & 8 Vict. c. 96, s. 68. *Walters v. Turton*, 413

### SPECIAL DEFENCE.

Where, to an action on a promissory note, the defence is want of consideration, five days' notice of such defence must be given to the plaintiff, although not one of the special defences named in sect 76.

Sect. 78 empowers this court to apply the practice of the Superior Courts in cases not otherwise provided for. *Evans v. James and another*, 26

Defendant who has pleaded a special defence is yet entitled to go into any other defence which does not require to be specially pleaded. *Rowcliffe v. Dascombe*, 59

### SPLITTING DEMANDS.

The 63rd section of the County Courts Act (9 & 10 Vict. c. 95), enacts, that "it shall not be lawful for any plaintiff to divide any cause of action, for the purpose of bringing two or more suits in any of the said courts, but any plaintiff having cause of action for more than 20*l.* for which a plaint might be entered under this act, if not for more than 20*l.*, may a band on the excess, &c." Held, that the term "cause of action" does not mean a cause of action on one single entire contract, but should be interpreted "cause of one action."

In an action on a tradesman's bill, although each item of goods supplied or work done constitutes a separate contract, so that after the stipulated price becomes due the tradesman could sue for one item, yet the understanding is, that it shall be united with other items to form one entire demand.

Held, therefore, that the 63rd section applies to the case of a tradesman's bill in which one item is connected with another in this sense, that the dealing is not intended to terminate with one contract, but to be continuous, so that one item, if not paid, shall be united with another and form one entire demand.

But, *semble*, that the term "cause of action" will not extend to cover all contracts executed, however dissimilar in character, which, according to modern practice, could be included in one *indebitatus* count.

Whether this court could interfere by prohibition where the total sum due, being under 20*l.*, was wholly within the jurisdiction of the County Court, although several plaints had been brought upon the several items, *quære?*

*Quære*, also, in what manner the fact of

the abandonment by a plaintiff of above 20*l.* upon any claim, as p the 63rd section, should be made upon the proceeding of the court to relieve the defendant from future such excess so abandoned? *G Akyroyd*, 79

A plaintiff had brought two actions in the County Court against the same one of tort for an assault, the contract for the amount of a sum incurred by reason of the assault:

Held, that these were distinct actions, and might be separately brought in the County Court. *Hartley v. A*

Where a plaintiff had split his demand, he obtained judgment in two actions on the same "cause of action" under the *Grimbley v. Akyroyd* (1 Cox & M and it appeared from the par demands annexed, that two plaints entered on the same day by plaintiff, against the same defendant, for goods sold and delivered:

Held, that this was a sufficient ground to set aside the first judgment, to enable this Court to issue a writ of prohibition in the second.

Prohibition will issue after judgment given but not satisfaction. *Worth v. Dowsell*, 118

Plaintiff brought two actions in the County Court against the defendant, 19*l.* 8*s.* 4*d.* rent in arrear, the 9*l.* 14*s.* 2*d.* for double value for his goods after notice to quit, under stat. c. 68, s. 1:

Held, that these were distinct actions "within the meaning of the County Courts Act, and might be the subjects of separate plaints:

Held, also, that the County Court has jurisdiction in such action for do it being "a plea of personal action."

Where the parties had consented to get rid of the objection that plaintiff divided his demand, that he was nonsuited on one of the plaints, and nonsuited accordingly:

Held, that this consent was a bar to the objection. *Wickham v. Lee*, 1 Defendant being indebted to plaintiff exceeding 20*l.* they entered a plaint in the County Court for, and recovered, 1*l.* The plaintiffs afterwards sued for the balance in the superior court, the declaration containing counts for money lent, for and account stated. Defendant pleaded the whole declaration the former County Court judgment, and that the plaintiff's cause of action for the 19*l.* 9*s.* 6*d.*

in the declaration for which a bill, if the whole had been under been entered at the time of so for the 19l. 9s. 6d. :

at it should have averred the action in the County Court to be as those for which the action was

the Superior Court ; and that action " in the 63rd section of the act. c. 95, does not include all be inserted in one indebitatus

whether, when the plaintiff re- the excess over 20l., to enable in the County Court, it should entered upon the judgment of the court accordingly, that the excess added, and that the judgment is in excess of all demands? *Gregory and Chidsey*, 145

plaintiff had a cause of action excluded, but nevertheless sued in a court for part only of his demand, and such part, and it did not appear to the County Court that the claim was part exceeding 20l., or that plaintiff had intended to show that he abandoned beyond 20l. :

at he might still sue in the court for the excess, if above 20l. *Mould*, 320

sued out two complaints in a County Court particulars of the first exceeded 20l. and labour, and goods sold and not purported to give credit for a value a balance under 20l. The value of the second complaint were items lent and interest, not exceeding 20l. Some of the items in the complaint were contemporaneous, but there were in any other way connected. As were heard, and the plaintiff retained amounts in respect thereof. His application in support of a motion for prohibition, on the grounds that the value had been reduced below 20l. by a bill, that the two complaints constituted one cause of action, showed that objections were raised at the hearing, where had never been any account which it had been agreed that the bill should be allowed ; but did not show plaintiff, at the hearing of the first bill more than 20l. to be due, or had not been at the hearing and that between the parties to allow the

at the affidavits were defective grounds ; that the judge might have defendant had consented to one of the claim, and that such

consent need not appear on the particulars of demand.

Held, also, that the particulars of the two complaints did not form one cause of action within 9 & 10 Vict. c. 95, s. 93, and that this was not a case of splitting demands. *Kimpston v. Willey*, 350

The printed prospectus of a school was handed to the defendant as the terms of the contract between him and the plaintiff, except that the amount to be paid was altered :

Held, that it did not require an agreement stamp under 55 Geo. 3, c. 184. *Clay v. Crofts*, 530

### SUGGESTION.

The effect of 9 & 10 Vict. c. 95, ss. 4, 5, 6, is only to repeal in a qualified way the various County Courts Acts specified in the schedule ; and, therefore, where an action was brought in the Superior Court prior to the County Courts Act coming into operation, but tried afterwards, a suggestion may still be entered to deprive the plaintiff of costs, where, as in the Middlesex County Courts Act, that is the proper mode of proceeding. *Sansom v. Price*, 40

In an application for leave to enter a suggestion to deprive the plaintiff of costs for having brought an action in the Superior Court for a cause of action that was within the jurisdiction of the County Court, it is necessary that the affidavit should expressly show every particular requisite to give jurisdiction to the County Court, and negative every exception.

Therefore, where the affidavit omitted to show that the cause of action arose wholly or in some material part within the jurisdiction of the County Court within which defendant resided at the time of action brought, or that he had resided there within six months, the application for leave to enter the suggestion thereupon was refused. *Bailey v. Robson*, 122

An affidavit in support of an application to enter a suggestion to deprive a plaintiff of costs for having sued in a Superior Court for a cause of action that was within the jurisdiction of the County Court, must negative the exceptions to the jurisdiction of the County Court, by showing that defendant did not come within either of such exceptions.

Therefore where the affidavit did not show that the defendant in the court below was not an officer of the County Court, it was

Held to be insufficient, and leave to enter the suggestion thereon was refused. *Meetan v. Nicholls*, 123

In an application for leave to enter a suggestion to deprive the plaintiff of costs for having

brought an action in the Superior Court, for a debt that was within the jurisdiction of the County Court, it is necessary that the affidavit should expressly state the facts that go to establish that defendant was within the jurisdiction of the Inferior Court at the time of the action brought.

Therefore, where the affidavit omitted to aver that at the time of action brought defendant dwelt or carried on his business within the jurisdiction of the County Court, this court refused leave to enter a suggestion to deprive the plaintiff of his costs. *Matthew v. Broughall*, 125.

On a motion for a suggestion, it is not necessary to negative the fact that plaintiff is an attorney, that is matter that properly should come from the other side. *Butler v. Coney*, 141.

Final judgment on a verdict for less than 20*l.* was signed on the 17th of May. A summons at chambers was taken out to show cause why the defendant should not enter a suggestion to deprive the plaintiff of costs, and was dismissed for insufficiency of the affidavit. Two other summonses were afterwards taken out, and also dismissed on the ground that the matter had been previously disposed of by another judge. Then an application was made to the court within the first four days of term.

Held that the application was in time, and was not precluded by the previous application at chambers.

The affidavit in support of the application for leave to enter a suggestion, stated that the defendant, at the time of bringing the action, carried on his business at No. 133, Fenchurch-street, in the city of London, and dwelt and carried on his business in the city of London aforesaid, and that the plaintiff, at the commencement of the suit, did not dwell more than twenty miles from the defendant, but, on the contrary, did dwell within the distance of one mile from the defendant.

Held, to be insufficient, inasmuch as it did not show that the action was not one in which there is a concurrent jurisdiction with the Superior Courts, under sect. 112 of the City of London Act (10 & 11 Vict. c. lxxi.), and which is there given in cases where the plaintiff dwells more than twenty miles from the defendant.

Whether a suggestion may be entered where the plaintiff does not dwell more than twenty miles from the defendant's place of business, although he dwells more than twenty miles from defendant's dwelling, *quære*? *Peterson and another v. Davis*, 148.

Upon an application to enter a suggestion upon the roll to deprive a plaintiff of costs, on the

ground that the action should be brought in the County Court, it is to negative that the judge of the Court certified that the action brought in such Superior Court. (*Vict. c. 95, s. 121.*) *Nind v. B*

Upon the hearing of a summons at chambers, to enter a suggestion to deprive the plaintiff of costs, under the County Courts Act, an objection to the sufficiency of the affidavit summons was ajourned that it might be amended. The matter came on upon the amended affidavit judge made the order. Upon a rescind that order, this court retained any objection to the sufficiency of the affidavit which had not been made at chambers.

The order did not in terms require to be brought in.

Held to be unnecessary.

*Semble*, that an affidavit, in which the action ought to have been brought in the Bloomsbury County Court, and defendant resides in the City of London, is insufficient to show a residence within the jurisdiction. *Suggot v. Cole*, 141.

In order to obtain leave to have a suggestion entered, to deprive a plaintiff of costs, it is only necessary to show the reasonable ground for doing so, in the case within the stat. 9 & 10 Vict. c. 128, 129. The rule in *Bailey v. Cox* (1 Cox Macrae), affirmed.

Where the affidavit of the defendant states that the plaintiff carried on his business in the City of London, but did not show where he resided, and omitted to specify the particular Courts within which a material cause of action arose, the court, although the affidavit was manifestly insufficient, made the rule absolute for a suggestion. *Hayter v. F*

In order to obtain leave to enter a suggestion on the record to deprive the plaintiff of costs under the County Courts Act, the defendant must expressly negative that the plaintiff is within any of the Courts mentioned in the 128th section; and in negative that the defendant resides within twenty miles of the plaintiff, it is not sufficient to say that he resides within a shire and within the jurisdiction of the County Court.

The court cannot order judgment against a plaintiff, without costs, to be entered on the 129th section, without a suggestion being entered on the record. *Brooker v. Cooper*, 149.

On an application for leave to enter a suggestion upon the roll to deprive a plaintiff of costs, on the

deprive the plaintiff of costs, where it did not state in terms that the plaintiff resided within twenty miles of the court discharged the rule with *mett v. Colson*, 202

enter a suggestion on the roll to deprive the plaintiff of costs after judgment, without a previous application to set aside judgment, if signed. If there be no suggestion entered on the record, an application to enter a suggestion cannot be

the provisions of sect. 129 are applicable to a judgment by default, *Smith v. Roberts*, 210

enter a suggestion to deprive a plaintiff of costs under the County Courts Act, if judgment is already signed, the suggestion must be set aside the judgment as to enter a suggestion. *Moore v. Moore*, 12

plaintiff is unable to ascertain whether judgment has been signed, so as to enable plaintiff to apply for leave to entertain a suggestion, the court will grant a rule to set the judgment aside, if entered, &c. *Vicars v. Vicars*, 12

in which was founded a motion for judgment to deprive the plaintiff of costs under the County Courts Act, "the cause of action arose, in some manner, within the jurisdiction of the County Court, in which the plaintiff dwells and carries on business, or the goods, except to the amount of the debt delivered to the defendant at the defendant's house, which is within the County of the Westminster County Court, is the place where, before and at the commencement of this suit, the defendant is employed, and dwells and carries on business, and that neither the plaintiff nor the defendant is an officer of the County Court, nor was any party said County Court a party concerned in the matter in question in this cause." This is insufficient, inasmuch as it is now that defendant "dwelt" or "carried on his business, at the time of the action brought, within the jurisdiction of the County Court."

is insufficient, also, because it is neither plaintiff nor defendant who is the court, whereas it should have been either of them was an officer at the time of the action brought.

the 128th section of the County Courts Act enabling an action to be brought in the County Courts, "when the cause of action arises wholly or in some manner within the jurisdiction of the

court where the plaintiff dwells or carries on his business at the time of the action brought," is not that "if no material part of the cause of action arises out of the jurisdiction," and, not as generally read, "if any material part arises within it." *Dodd v. Wigley*, 213

If defendant suffers judgment to go by default, and the jury on the writ of inquiry assess the damages at 40s. only, he is not entitled to enter a suggestion, to deprive the plaintiff of costs under the County Courts Act. *Cresswell, J., dissentiente. Reed v. Shrubsole*, 226

The rule nisi to enter a suggestion to deprive a plaintiff of costs, because the sum recovered in an action of tort was less than 5*l.* under sect. 129 of the County Courts Act, must state upon what ground it was obtained.

Where the rule nisi in such a case, stated only that the verdict found for the plaintiff was less than 20*l.* it was held to be insufficient, and the rule was discharged with costs. *Snook v. Dorman and another*, 239

In an affidavit to enter a suggestion it is sufficient to state that the cause of action arose within the jurisdiction of the court, without specifically stating where or in what manner the cause of action arose. *Tennison v. Mortimer*, 250

It is not sufficient for an affidavit for a suggestion merely to state that the cause of action arose within the jurisdiction of the court, but a *prima facie* case for a suggestion must be made out.

Therefore, where the affidavit stated that the orders for the goods sold were written at K., which is within the jurisdiction of the County Court of B.; and a counter affidavit stated, that though written within, the orders were delivered out of, the jurisdiction;

Held, to be insufficient, as no cause of action arose until the orders were delivered. *Wood and others v. Clutterbuck*, 252

A stranger to the cause may make an affidavit deposing to the facts necessary to be brought before the court, for the purpose of entering a suggestion on the roll to deprive the plaintiff of costs under the County Courts Act, 9 & 10 Vict. c. 95.

A plaintiff traversing the suggestion is not entitled to the costs of the issue, though he succeeds. *Walker v. Furnell*, 275

An affidavit for a suggestion to deprive the plaintiff of costs stated that "before and at the time this action was brought, deponent carried on his business at &c., within the district of Southwark, in the county of Surrey, and within the jurisdiction of the Southwark County Court, holden under the provisions of the said act, and that the cause of action arose on some material point within the jurisdiction of the County Court of

Southwark aforesaid, and that at the time of the commencement of this action, the plaintiff did not dwell more than twenty miles from deponent, but dwelt within twenty miles from the deponent," &c.

Held, to be insufficient, because it did not distinctly show that defendant dwelt within twenty miles from plaintiff, insomuch that perjury could not be assigned upon it if plaintiff dwelt more than twenty miles from defendant. *Duck v. Barton*, 277

The defendant applied to a judge at chambers for time to bring in the roll that a suggestion might be entered. The affidavit was insufficient, and the summons was dismissed. Judgment was then signed and execution issued. On an application to the court on amended affidavits, a rule was granted to set aside the judgment, &c., and for a suggestion, the defendant paying the costs of the judgment, execution, and of the rule. *Poland v. Miller*, 302

An affidavit for a rule to enter a suggestion to deprive the plaintiff of costs, under 9 & 10 Vict. c. 95, s. 129, stated, "that the plaintiff dwells in Keppeel-street, Russell-square, in the county of Middlesex, within twenty miles of the defendant, who dwells at 65, Park-street, Russell-square."

Held, not to be sufficient, inasmuch as it did not distinctly state that plaintiff and defendant resided within twenty miles of one another.

The court will not take judicial notice of distances. The test of sufficiency of such an affidavit is, whether perjury could be maintained upon it.

The affidavit should state explicitly that the residence of the plaintiff is situate within twenty miles of the residence of the defendant. *Kirby v. Hickson*, 309

On a motion for a suggestion to deprive the plaintiff of costs, if the defendant makes out a good *prima facie* case, and there appears to be reasonable grounds for entering a suggestion, it is sufficient. *Walker v. Wall*, 318

An affidavit for a rule to enter a suggestion, which throughout described the defendant merely as "deponent:"

Held, not bad on that account.

The affidavit stated that "no officer of the said County Court was or is a party to this action:"

Held, to be a sufficient negating of the exception in the act and statement, that neither the plaintiff nor the defendant was at the time of the commencement of the action an officer of the County Court. *Nind and another v. Jones*, 329

An action was brought in the Queen's Bench to recover a sum under 20l. The plaintiff

took out a summons to try before. This summons was opposed by defendant, and the judge, with the consent of the defendant, made an order dismissing the summons, and ordering that, in the event of the plaintiff obtaining a verdict, should be taxed upon the higher of the trial the plaintiff obtained a verdict of 6l. 12s. The defendant then asked leave to enter a suggestion to deprive the plaintiff of costs: but,

Held, that, after the proceedings in chambers, the defendant was not entitled to enter a suggestion. *Gosling v. Condon*, 3

Upon an application to enter a suggestion to deprive the plaintiff of costs, the defendant made an affidavit that the costs which the action was brought in the district of the Windsor County Court. The plaintiff, in his affidavit, deposed that he was in support of his claim. There being no other testimony on either side, the court, upon these facts, refused the suggestion. *Caterer v. Dean*, 335

If, upon cause being shown against entering a suggestion to deprive the plaintiff of costs, the fact on which reliance for the rule is left in reasonable doubt, a suggestion will be granted. But if it appears that the fact is denied and is not explained, and the affirmative denial comes from the plaintiff and alone.

The case of *Caterer v. Dean* (ante) was not intended to apply to all cases of affirmative and negative allegations, but only to a fact sworn to on one side in one way, and denied and explained on the other side. *Mills v. Best*, 336

At the trial, before the under-sheriff, the plaintiff recovered 9l. 2s. 1d. only, and refused to stay proceedings to enable the defendant to apply for a suggestion to deprive the plaintiff of costs: the plaintiff signed judgment, and levied execution for damages and costs. Afterwards, the plaintiff obtained leave to enter a suggestion to set aside the judgment, not at that time move to set aside the judgment. In a subsequent term the plaintiff moved to set aside the judgment, and for the plaintiff to recover money paid upon the execution:

Held, that defendant might do so. *v. Blayney*, 337

In moving to enter a suggestion to deprive the plaintiff of costs under the County Court Act, husband and wife being both parties, the affidavit must state that both husband and wife were living within the jurisdiction of the County Court at the time the action was brought.





of the action dwelt at Birmingham, which is within twenty miles from Wolverhampton, the place where the defendant dwelt, and carried on his business at the time this action was commenced :

Held, to be insufficient, as not showing that the plaintiff and defendant dwelt within twenty miles of each other at the time the action was commenced. *Fry v. Whittle*, 443

An affidavit for a suggestion to deprive a plaintiff of costs under sections 128 and 129 of the County Courts Act (9 & 10 Vict. c. 95), stated "that the plaintiff at the time dwelt, resided, and carried on his business at T., in the county of Middlesex, and within the jurisdiction of the County Court of Middlesex, and that during the period within which the goods were sold, and at the time of the commencement of the suit, the defendant dwelt and carried on his business at B. in the county of Middlesex, and within the jurisdiction of the County Court of Middlesex; and that at the time of the commencement of the action, the plaintiff dwelt less than twenty miles from the defendant, that the cause of action arose, and the goods were delivered wholly within the county of Middlesex, and within the jurisdiction of the County Court of Middlesex; and that at the time of the commencement of the action the defendant dwelt and carried on business within the Brompton district of the County Court of Middlesex, and that the greater part of the goods were sold and delivered to him at his dwelling-house, within the Brompton district of the County Court of Middlesex."

Held sufficient to entitle the defendant to a suggestion to deprive the plaintiff of costs. *Charlwood v. Elliott*, 479.

### SUMMONS.

Summonses in respect of plaints entered after the commencement of twelve clear days, exclusive of Sundays, next before the holding of the then next court, to be made returnable at the next court but one subsequent to the entering of such plaints, and not at the then next court. *Rowlands v. Griffiths*, 28

Service upon the wife at the dwelling-house is sufficient if it be shown that the husband is in the habit of returning home at night. *Tardrew v. Davies*, 31

Service of summons on wife at dwelling-house, insufficient service, the husband having gone to reside elsewhere. *Thomas v. Thomas*, 32

A summons cannot be made returnable generally at "the next court" after the expiration of ten days from the day of service: some court must be named. *Tardrew and another v. Davies*, 36

Where defendant keeps house to evade of summons, it will be sufficient to the front door. *Hollier v. Week*  
The omission from the summons of "the particulars of which are annexed," as prescribed by the Act, is a fatal informality. *Anderson v. Mc*  
Proof of service of, 97, 106

The court will not interfere by mandamus because the summons, having been made by leave of the court for the district in which the defendant dwelt or carried on business within six months next before the summons was brought, or in which the cause of action did not, on the face of it, show that it had been obtained by leave of such court. *Handley*, 139

When a summons has been dismissed on the ground of variance from the plaintiff's statement, a new summons may issue on the same day as of the day on which the first was originally entered.

A plaint was entered on 30th March 1885 wherein defendant was rightly described as "H. T., executor of W. Thomas." At the hearing, the judge held the summons to be a nullity, and directed another to be issued against the defendant, the original plaint, numbered and dated as the first summons.

Held, that he had properly refused to set aside the summons. *Foster and another v. Temple*, 185

In the summons, the defendant was described as "yeoman" merely, and particularized to the plaintiff were, "To the plaintiff a shaft at &c.—to putting up a new shaft to cash paid for turf for drying and the cause of action accrued to the plaintiff, as miners engaged by the plaintiff in which defendant was a shareholder."

Held, that the cause of action was sufficiently disclosed in the summons: particulars. *Wedlake and others v. Ser*

### SUMMONS OUT OF JURISDICTION.

This court will require an application for a summons to enter into another district supported by an affidavit or declaration setting forth the grounds of such application and taken before a judge of the County Court, a Master Extraordinary in Chambers, or a commissioner of a Superior Court. *Lloyd v. Williams*, 29

The declaration or affidavit upon which a summons is founded for a sum issue out of the district should be thus:—"In the County Court of Middlesex at . . . In the matter of a claim against D. W. for 10*l.* for goods delivered." *Lloyd v. Williams*, 30

ch this court will adopt, with re-  
the issue of summonses into a  
strict, will be, that wherever the  
resident in this district, or the  
al will be less here than by suing  
rict where defendant resides, leave  
on to issue the summons, but not  
*Jones v. Meyrick*, 33

can only issue into a foreign dis-  
sect. 60 by leave of the judge  
court. It is a judicial act. *Prothero*  
o, 34

### UPERIOR COURTS.

was established under the County  
t, so that a plaintiff might have been  
erein at the time of action brought,  
which deprives the plaintiff of costs  
tion "for which a plaintiff might  
entered under this act," did not

re, where a writ in an action of  
as issued on the 25th of March,  
d plaintiff recovered only 40s.  
and the County Court for the  
as not actually established until  
5th, although it had been directed  
ed by the order in council on the  
arch,

at the right to sue in the Superior  
not affected by the terms of the  
ion of stat. 9 & 10 Vict. c. 97.  
*Crouch*, 42

Courts will not entertain an action  
a less sum than forty shillings,  
re is no other court in which the  
r be brought. *Sutton v. Parment*,

### TITLE.

urty to an action in the County  
s up an assertion of title, and  
emption therefrom from the juris-  
der the proviso in the 58th section  
ounty Courts Act, the court is not,  
re assertion of such claim, forth-  
d of its jurisdiction, but the judge  
ed to hear and determine if such  
title be *bonâ fide* and substantial,  
pinion that it is not so, he may go  
ment.

er to an action of trespass, defend-  
ed for himself, as an inhabitant of  
of B., a right by immemorial cus-  
er the plaintiff's land to take fish:  
hat no such custom of profit d  
the soil of another can exist in  
that the jurisdiction of the court

could not be ousted by pretence of a custom  
that has no existence.

Held, also, that the 58th section would  
not extend to such a case as this, inasmuch  
as the claim in question is not to a heredita-  
ment, corporeal or incorporeal, and therefore  
it would not be one of the exceptions from  
the jurisdiction of the County Courts. *Lloyd*  
*v. Jones*, 111

In order to oust the jurisdiction of the County  
Court by a claim of title to hereditaments,  
under the proviso contained in the 58th sec-  
tion of the County Courts Act, such claim  
must be *bonâ fide* and substantial, and in  
order to determine if it be so, it is competent  
for the judge to hear the evidence that he  
may ascertain if the case be within the terms  
of the proviso. The mere assertion of title  
by the defendant is not, of itself, sufficient  
to oust the jurisdiction of the County Court.

When, however, the judge has heard and  
determined that the case is within his juris-  
diction, this court will review his decision  
upon that point only, and if of opinion that he  
has wrongly decided, and that the case came  
under the proviso in the 58th section, a pro-  
hibition will be granted. *Lilley v. Harvey*,  
*Owen v. Pierce*, 115

It is the duty of the judge of the County Court,  
in the first instance, to determine whether  
the title to land is in question so as to come  
within the 58th section of 8 & 9 Vict. c. 95.  
but if he decide improperly, the Superior  
Court will issue a prohibition. *Thompson v.*  
*Ingham*, 348

On a rule for a prohibition to the judge of a  
County Court, on the ground that the title  
to the premises sought to be recovered came  
in question, it appeared that the defendants  
occupied the premises, under a written agree-  
ment with the owner, for the purchase of the  
premises for 150l. The sum of 8s. per week  
was to be paid until the whole of the pur-  
chase-money was paid up, the 8s. weekly to  
go in liquidation of the purchase-money:

Held, that the ordinary relationship of  
landlord and tenant did not exist, and that  
the County Court had no jurisdiction.

*Banks and another v. Rebbeck and Wife*, 486  
The 13 & 14 Vict. c. 61, s. 13, throws the onus  
upon the plaintiff of showing that he could  
not have sued in a County Court, in order to  
entitle him to costs, and does not apply to  
every action of trespass to which the defen-  
dant has pleaded "not possessed."

In order to oust the jurisdiction of the  
County Court, the plaintiff must show that  
the title to the premises did *bonâ fide* in the  
case come in question. *Lathom v. Spedding*,  
498

See JURISDICTION.

**TRESPASS.**

*See* PROCESS (SERVICE OF.)

**TROVER.**

The finder of lost goods has a good title to them against all the world, except the true owner; and that right is not affected by the circumstance that they were found inside the shop of another person, and handed over to him for the mere purpose of delivering them to the true owner, if he should appear. *Bridges v. Hawksworth*, 557

**TRUCK ACT.**

A man employed and working as a collier in a coal mine, dismissible at a month's notice, and paid at a certain rate per ton of coals got by him, but not bound to work any fixed number of hours, and being at liberty to employ men to assist him, is an artificer or workman within the meaning of the Truck Act, and his wages must be paid in money, not in goods, if by the contract he is bound to give his personal labour in the performance of the work. *Weaver*, appellant, v. *Floyd*, respondent, 599

In an action for wages, by a collier, it was proved that he had received the amount due to him, in the current coin of the realm, at a pay-office, adjoining a shop kept by his employers (a joint-stock iron company), for the sale of goods to their own workmen, and other people; but that he had spent the money in the master's shop immediately upon the receipt of it. In order to show that he had dealt at the shop under compulsion, evidence was offered of a conversation between the plaintiff and the overlooker under whom he worked. The overlooker had no authority to employ or dismiss the men under him,

which was the duty of the coal agent. It was stated that he had received a price clerk in the office of the coal agent. His principal duty was to ascertain the amount of work done by the men, and to certify of the persons whom he was to receive wages, not dealing at the shop, that that was the plaintiff's name, and to produce it at the time of the payment above mentioned. In that conversation the overlooker threatened the plaintiff with the employer's displeasure if he did not deal largely at the shop:

Held, that that statement was admissible in evidence against the plaintiff's employers:

*Quære*, if the evidence had been admissible, whether it would have rendered subsequent payments of money spent at the shop invalid as contrary to the Truck Act. *Smith*, 620

**WRIT OF TRIAL.**

The 3 & 4 Will. 4, c. 42, s. 17, provides that in any action in any of the Superior Courts of law, if a demand under 20*l.*, the court may order that the issue joined before the sheriff of the county in which the action is brought, or any judge of the County Court of the county, shall be a Court of Record for the recovery of the debt or damages. The County Courts Act, 1888, enacts that every court holden under the County Courts Act shall be a Court of Record:

Held, that the County Courts under 9 & 10 Vict. c. 95, are not courts of record as are contemplated by the 3 & 4 Will. 4, c. 42, and that, therefore, a writ of *habeas corpus* cannot be directed to a County Court established under the County Courts Act, 1888. *Owens v. Breeze*, 500

REPORTS OF  
COUNTY COURTS CASES  
AND  
APPEALS,  
ARGUED AND DETERMINED  
IN  
THE SUPERIOR COURTS:

ALSO  
*Reports of Cases relating to Insolvency.*

---

T. W. SAUNDERS, AND D. C. MACRAE, ESQRS.,  
BARRISTERS-AT-LAW.

---

VOL. II. — 1852-1854.

London:  
JOHN CROCKFORD, 29, ESSEX STREET, STRAND.

REPORT OF

THE SELECT COMMITTEE

ON THE

STATE OF THE

LONDON:  
PRINTED BY JOHN CROCKFORD, 29, ESSEX STREET  
STRAND.

## PREFACE.

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In presenting the present Volume to the Profession, some explanation is due on account of its unusually limited number of pages.

Upon the completion of the First Volume, it was discovered that Cases had been permitted to get greatly in arrear, and the Editors who then undertook their compilation feeling that such a state of things was most undesirable, resolved upon adopting a more vigorous and exact course, and to this end determined upon bringing out simultaneously all the Cases then in arrear and those which were then current. In the prosecution of this object, they determined upon devoting the Second Volume entirely to the Cases so in arrear, and of commencing the Third Volume with New Cases.

This plan has been strictly followed, and in the present Volume, though small in size, will be found all the Cases decided upon the subject between those which conclude the First and those which commence the Third Volume.

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TO

## COUNTY COURTS CASES.

### ACTION.

See JUDGMENT.

### AMENDMENT.

particulars in a plaint in a County ed that defendant had deepened the river, and thereby varied the by the plaintiff had been deprived tomed head of water at his mill. in evidence that the defendant y deepened the bed of the stream, as plaintiff recovered damages in that the defendant then erected land a dam, which, while it re- pt up the head of water; that afterwards removed the dam, on water fell, and the plaintiff then e present action. The County e, thinking the particulars were ough to meet the evidence as to the water, directed an amendment, 04 of the County Courts rules, and words "and unlawfully lowered before the word "whereby," in lars. It was objected that the Rule 104, could only amend in riance between the allegations and there was no variance here, and quently, the amendment was im-

at on an appeal from a County not be taken as an objection to tion of the Court of Appeal that of appeal does not contain any of the grounds of dissatisfaction cision of the County Court judge, l by the 151st of the County s. ariance exists, though it may be in proceedings in a County judge of such court has a dis- amend under rule 104, and the ppeal will not interfere with such *Cannon v. Johnson*, 25

### APPEAL (COURT OF).

*Standcliffe v. Clarke*, 13

See PARTICULARS OF SUMMONS.

### APPEAL (NOTICE OF).

*Cannon v. Johnson*, 25

See AMENDMENT.

### CARRIERS.

The North Western Railway Company published a notice, with which the plaintiff was acquainted, that they would not be responsible for packed parcels unless the contents were declared; and that they would not carry them unless the contents were declared, with the names and addresses of the persons to whom they were sent; and that the senders would be taken to warrant that parcels were not packed parcels. The plaintiff sent a parcel which the defend- ants knew to be packed, but no particu- lars were given. The parcel was taken by the company. It being left to the court to say whether the notice and the sending of the goods under the circumstances were sufficient to prove a special contract under 11 Geo. 4 & 1 Will. 4, c. 68, s. 6:

Held, that it was not sufficient, and that the defendants were bound to prove an assent to the terms of the notice, *Crouch v. North- Western Railway Company*, 1

### CAUSE OF ACTION.

*Wilde v. Sheridan*, 22

See JURISDICTION.

### CHARTER-PARTY.

By terms of a charter-party, it was agreed be- tween the captain and freighter, that the vessel should "on the first opportunity, and with

all possible despatch after the signing of the charter-party, proceed to the Tyne, and on arrival there to be ready forthwith, in *regular turns of loading*, to take on board, by spout or keel, as directed, a full and complete cargo of four keels of coals, and the remainder coke." The vessel proceeded to the Tyne, and the day after her arrival was entered by the freighters on the coal-list, in conformity with statute 8 & 9 Vict. c. 73, regulating the loading of coal-vessels with coal in the river Tyne. The provisions of that statute are limited to the loading of coals, and do not expressly include coke. The day after the vessel's arrival in the Tyne, the freighters went to the coke-sitters, to ascertain when the vessel would get her turn for loading coke, and were informed that two vessels must take their turns before her. On the 3rd February the vessel, having taken in her coal, went to "the S. and T. drop," for the purpose of taking in coke. Snow having fallen, the passage of coke down to the water's edge was prevented, and the vessel lay waiting her turn for coke till the 11th March, when she completed her cargo. In the meantime, on the 17th February, the captain protested against the detention of the vessel, and the freighters offered to ship the required quantity of coke at another place, on payment of a shilling a ton more by the captain. This was declined. The captain brought an action in the County Court to recover 50*l.* damages from the freighters for not loading his vessel in a reasonable time, and for the wrongful detention of the vessel, and the non-performance by them of the stipulations in the charter-party, in respect of putting on board the cargo. The freighters pleaded, amongst other defences, that the charter-party stipulated for the vessel to be loaded in regular turns of loading, and not within any particular time; and that the question of a reasonable or unreasonable time did not arise on which to charge them. Evidence was also tendered by the freighters to show that there was no act of Parliament to regulate the turn for coke as there was for coals; and that a custom prevailed at the port of loading to enter a vessel as soon as chartered on the fitter's list, and to load coke accordingly. The judge rejected this evidence, and directed the jury that under the charter-party it was necessary that the cargo of coals and coke should be put on board in turn. A verdict passed for the plaintiff (the captain) for 50*l.* Upon appeal, stating the above facts:

Held, that the words "in regular turns of loading" contained in the charter-party being

ambiguous, the judge wrong evidence of custom, and that the jury that the contract was turns of coal first and coke afterwards, was a misdirection; and that a new trial had accordingly.

The court, though heretofore otherwise, will in future, in conformity with the rule in other courts (justices of the Peace, Exchequer, but not so in the Queen's Bench), order that costs shall follow the appellant. *Schultz v. Leideman*,

#### CLERK OF COUNTY COURT

It is not the duty of the clerk of the County Court to prepare a notice of a writ by the judge upon the defendant's instalments.

An order to pay by instalments is not a judgment.

An action was brought in a County Court against A. and B., and in the course of the trial it was adjudged that the plaintiff was entitled to recover a certain sum, and that it should be paid by instalments. The clerk of the court issued an incorrect notice, which was served on the defendant. His goods were afterwards seized in execution, according to the real order. In an action brought by the clerk for breach of duty:

Held, that the clerk was not liable, being no such duty as alleged. *Gill*, 4, 42

See COUNTY COURT (CLERK)

#### CLERK OF THE PEACE

The sheriff is not bound, as a ministerial officer, to levy all fines that are returned to be unpaid on the roll returned to the clerk of the peace, under the 3 Geo. 4. c. 26. He ought not to levy where the defendant has received the fines.

The clerk of the peace recorder of the court will be liable (if he neglects) to pay such fines as paid on the roll returned to him and delivered to the sheriff for payment, if he receives such fines, if he receives such neglect.

*Quere*, whether the clerk of the peace is liable where the fines are returned to the Second Court by the person who is to record the proceedings of the Court of Sessions, under the 59 Geo. 3. c. 12.

*Semble*, that his liability will depend on the fact whether such appointee is a ministerial officer of the clerk of the peace or a judicial officer. *Wildes*, app., *Morris*, 1

COMMITMENT.

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COURT JURISDICTION.

, 143

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y, 101

See STAMP.

COSTS.

action for tort, brought before f 13 & 14 Vict. c. 61, after been given in his favour on a ne of the defendant's pleas, ial and recovered less than 5l. he judge refused to certify. e was not entitled to the costs r. *Abley v. Dale*, 34

Vict. c. 61, s. 11, provides r action of trespass plaintiff a sum "not exceeding five hall have no costs; and the rovides, that if the plaintiff a sum less than the sum in reinbefore mentioned," and l certify, he shall be entitled l plaintiff in trespass recovered nt of 5l.

he judge had power to certify he 12th section. *Garney v.*

two plaintiffs, where one of ithin and the other beyond f the defendant, the superior urrent jurisdiction with the s. *Hickie and another v.*

on Small Debts Act, 14 & 15 s. 119, deprives of costs the in actions commenced in the , which might under that act nenced in the Sheriff's Court, is given for more than 50l. , the plaintiff is deprived of actions in the superior courts, 20l. is recovered, and it also he necessity of a suggestion: ie 119th section was not reled by the 120th section, and of the whole in actions where is recovered, was to deprive costs, without the entry of a t that where a sum amountl not exceeding 50l. was redict, a suggestion must be

entered to deprive the plaintiff of costs. *Castrique v. Page*, 110

A plaintiff having recovered less than 20l. is not bound, in making an application for his costs, to come in the course of the next term after the verdict or award. And where, the action having been referred, the arbitrator made his award on the 9th June for a sum less than 20l., an application made on the 7th February in the following year:

Held, not too late. *Morris v. Boswell*, 141

A cause in which the superior courts had concurrent jurisdiction, was tried the 2nd February, 1852, and a verdict having been returned for the plaintiff, an application was made on the 26th January, 1853, to a judge at chambers, under 15 & 16 Vict. c. 54, s. 4, for an order for the plaintiff's costs. The judge dismissed the summons; and on the 21st of April the plaintiff obtained this rule:

Held, that the application was made in time. *Reid v. Gardiner*, 143

COUNTY COURT (CLERK OF).

*Robinson v. Gill*, 4

CRIMINAL INFORMATION.

Upon an application for a rule for a criminal information against a County Court judge, the court refused to interfere, it not appearing or being suggested that the judge acted from any corrupt or improper motive. *Ex parte Wilton*, 52

DETINUE.

See JURISDICTION.

DISTRESS.

A plaintiff in the County Court delivered particulars of his claim, containing six items. The fourth was for continuing on his premises and proceeding to sell after abandonment of a distress. He had given a notice of action pursuant to 5 & 6 Vict. c. 54, s. 19, wherein he stated his cause of action to be "for entering his premises and seizing three in-calf heifers, under colour of a distress, and also for selling and driving away three heifers belonging to him." The County Court judge held that the plaintiff was not entitled under that notice to give evidence of the fourth item in his particulars; but this court held that he was, and directed a new trial. *Howard v. Remer*, 161

## FALSE IMPRISONMENT.

The plaintiff having been arrested and imprisoned by the defendants, who were police constables, on a charge of furious driving, brought an action of tort against them in the County Court. At the trial the plaintiff, in opening his case, stated that the defendants had taken him into custody and detained him for some time in a station-house on a false and unfounded charge of furious driving, and that on their evidence he had been convicted of the offence by two justices of the peace and fined 20s. For the defendants it was thereupon objected that, by that admission, the plaintiff had put himself out of court. A copy of the conviction was put in evidence; the plaintiff admitted he had paid the penalty, and had not appealed against the decision of the magistrates: and the County Court judge, considering that the conviction was a conclusive answer to the action, so directed the jury, and a verdict was accordingly found for the defendants. The judge stated the case for this appeal, but it did not show that the plaintiff committed the offence of furious driving within view of the defendants, so as to justify the arrest of plaintiff under 2 & 3 Vict. c. 47, s. 54:

Held, on appeal, that the direction of the County Court judge was wrong, and the judgment must be reversed. *Justice v. Gosling and others*, 77

A plaintiff having obtained judgment in the County Court for debt and costs; upon failure of the defendant to pay, took out a judgment-summons under section 98 of 9 & 10 Vict. c. 95; which was personally served upon the defendant. He did not appear pursuant to that summons, and the County Court judge ordered him to be committed to prison for seven days, or until discharged by the due course of law. The clerk of the court made out the warrant, which was delivered to the bailiff, and the defendant was afterwards arrested under that warrant. Before the arrest, he had paid to the plaintiff the amount of debt and costs, and notice of that payment had been given by the plaintiff to the clerk of the court.

In an action for false imprisonment against the clerk and bailiff of the court:

Held, that the payment was no supersedeas of the warrant, and that the arrest under it was lawful. *Davies v. Fletcher and others*, 137

## FERRY.

A lessee of a ferry receives on board of his ferry-boat a mare of B., who keeps charge

of her on board. Slips for 1 provided by the owner of the ferry-boat has a damaged handrail, by which the mare is injured, he was liable for the loss.

Held, that the ferryman was provide the means of landing, negligently provided a slip with handrail, by reason of which the injured, he was liable for the loss.

Held, also, that where an order was raised on the argument of the case was not urged at the trial, the court send the case back to the judge amended, so as to give the means of upon such objection. *Horridge v. 1 and others*, 53

## GOODS (SALE OF).

Goods of a deceased husband remain in the wife (the plaintiff's) possession, not his executrix, nor ever took out administration. The wife married and while living with the man a man sold the goods to the defendant who received the price with the wife's knowledge who apparently concurred in the sale the man was convicted of having a wife living at the time. the plaintiff, of which the plaintiff was not aware. The plaintiff then defendant for the price of the goods.

Held, that she was not entitled. *Drakeford v. Waller*, 114

## HABEAS CORPUS.

Under 9 & 10 Vict. c. 95, ss. 99 and 100, a judge of a County Court has power to commit a defendant who is summoned for non-payment of money pursuant to judgment of that court as often as an order is made; and where therefore a debtor has been once committed for non-payment, he may at the expiration of that imprisonment be again committed having the means of paying, he is bound to pay, upon which, the decision of the County Court is conclusive. *Boyce*, 151

## INJUNCTION.

A legatee will be restrained from prosecuting an action in the County Court under 65 of 9 & 10 Vict. for a legacy u

renounced in a suit in this administration of the testator's estate the legatee submitted to the executor *de* only on the allegation of a *latchiffe v. Winch*, 109

ENTS (PAYMENT OF).  
K OF COUNTY COURT.

### TERPLEADER.

summons having been taken into Court, was heard, when the creditor made an objection of claim delivered to the plaintiff was insufficient, and the judge in his favour, and dismissed the plaintiff's prohibition properly issued to the proceedings of the County Court the jurisdiction of the judge in the suit was suspended by the intervention; and that he could not exercise jurisdiction by deciding upon a question.  
The claimant being given a writ of habeas corpus, instead of Elizabeth, such a mistake as to make the demand delivered under the writ. *Roberts v. Wardell*, ex 159

### JUDGMENT.

not be maintained in the superior court of Westminster upon a judgment of a court under the 9 & 10 Vict. c. 95, *Wardell v. Roberts*, 116  
not maintainable in a superior court judgment in a County Court, under 9 & 10 Vict. c. 95, or the cause of action for which the County Court issued. *Austin*

### JURISDICTION.

if sued by leave of a County Court for the district "in which the cause arose," by virtue of section 10 Vict. c. 95, the whole cause of action have arisen in such district. The plaintiff at Norwich, drew there a writ upon B., who resided in that place he accepted it, and took back to A. at Norwich, who did it over. The bill being dis-

honoured at maturity, B. paid the amount to the indorsee, and then sued A. (by leave of the judge) in the County Court of Norwich upon it:

Held, that as B. accepted the bill in London, the whole cause of action did not arise at Norwich, and, therefore, that the judge of the County Court at Norwich had no jurisdiction to try the cause. *Wilde v. Sheridan*, 22

The plaintiff, by a written contract, undertook to carry for defendant by canal to London, timber lying in a field a little distance from the plaintiff's wharf. When the defendant's horses were on the spot, the timber was hauled by them to the plaintiff's wharf; at other times the plaintiff provided a team for hauling the timber to the wharf, and made an extra charge to that for the carriage to London. The plaintiff sued out a plaint in S. County Court; the place of delivery of the timber was not within its district, neither did the defendant dwell within it:

Held, that there was no distinct cause of action in respect of the hauling the timber to the wharf; and that the cause of action arising only on the delivery of the timber in London, the cause was not within the jurisdiction of the S. County Court. *Barnes v. Marshall*, 32

The owner of a wharf brought an action against the owner of the adjoining wharf for obstructing his premises, by permitting barges, &c., to overlap them. The defendants pleaded a custom of the river Thames that the proprietors of wharves may overlap their neighbours' premises for a reasonable time while unloading. This custom the plaintiff traversed; and there was also a new assignment, that the obstruction was for an unreasonable time:

Held, that the action showed no claim to an incorporeal hereditament, or franchise, so as to bring the case within 9 & 10 Vict. c. 95, s. 58, and that the County Courts have jurisdiction to try matters of disputed right. *Davies v. Walton and another*, 48

By the 1 Vict. c. 33, a right to recover a paving rate in one of the superior courts of record at Westminster, was given:

Held, that the County Court had jurisdiction, and that a plaint might be entered therein for the recovery of the rate. *Stewart v. Jones*, 50.

Dues payable to the trustees of a harbour by vessels passing within certain limits are tolls, and the question whether dues are payable both on the outward and homeward voyages, is a question of title within sect. 58 of 9 & 10 Vict. c. 95 (County Courts Act), and one not within the cognizance of County

Courts. *Adey v. The Deputy-Master of the Trinity House*, 55

Plaintiff being the owner of a cottage, under-let to one of the defendants the whole except (as he alleged) two rooms reserved thereout for himself. Defendant alleged that the plaintiff had let him the whole cottage, and he accordingly, with the other defendant, entered those two other rooms and removed plaintiff's furniture. Plaintiff brought an action against them in the County Court for doing so. The defendants contended that the County Court judge had no jurisdiction, as the title to a corporeal hereditament came in question. The County Court judge decided he had jurisdiction, and gave a verdict for the plaintiff for 25*l.*:

Held, that the County Court judge had not, in this case, jurisdiction, as title to land was in dispute, and that a writ of prohibition must issue. *Chew v. Holyrood and another*, 56

A cargo was sold to plaintiff, to be delivered at any port in the United Kingdom: the price to be paid on delivery of the shipping notes and policy of insurance. A demand of the shipping notes and the policy was made at Liverpool, and refused, but the cargo was ordered to be delivered at Drogheda. Thereupon plaintiff sued in the County Court at Liverpool, and, in the particulars annexed to the plaint, alleged his claim to be for 43*l.* damages for non-delivery of the cargo:

Held, on motion for prohibition, that, the plaintiff not having a cause of action for non-delivery of the cargo arising within the jurisdiction of the Liverpool County Court, the writ must go to restrain the proceedings as to that, but that, as the plaintiff had a cause of action arising at Liverpool for not delivering the shipping notes and the policy, the writ would not be a general prohibition as to the whole cause, for the plaintiff could apply to the County Court to amend his particulars of demand. *Walsh v. Ionides*, 84

Statute 9 & 10 Vict. c. 95, enacts, "that the jurisdiction of the County Court under this act shall extend to the recovery of any demand not exceeding the sum of 20*l.* which is the whole or part of the unliquidated balance of a partnership account, or the amount or part of the amount of a distributive share under an intestacy, or of any legacy under a will," By 13 & 14 Vict. c. 61, s. 1, the jurisdiction was extended to the recovery of any demand not exceeding 50*l.* An action was brought in the County Court of Kent to recover a legacy of 50*l.* from the executors. This involved a question of devastavit, and

the judge, doubting his jurisdiction for the defendant:

Held, that the above was jurisdiction, and that there was no trial:

*Semble*, that when a judge doubts about his jurisdiction he ought to refer to the law. *Winch v. Winch*, 86

An action may be maintained in the County Court to recover the expenses of a public body in removing a nuisance of the 11 & 12 Vict. c. 12 (Nuisances Removal Act), against the premises, even though the premises are disputed from whom the expenses are due. *v. Harden*, 135

The County Court has jurisdiction in questions of title to corporeal hereditaments in replevin, and replevin cannot be removed from the County Court, except on compliance with the provisions in section 119, and the provisions of the Act. *Reg. v. Raine*, 140

The County Courts retain the jurisdiction of the old County Courts to try actions for detinue, with this difference that the sum is extended to 50*l.*; but if, in the trial, it should appear that the goods are worth more than 50*l.*, the jurisdiction of the court is ousted, as in case of realty is concerned. *Taylor v. Taylor*, 145

A plaintiff in a County Court claim against a defendant, as an inhabitant within the chapelry of B., certifies that "the ancient customary year sum of 4*d.* from each household at Easter," to which he alleged he was entitled as "parish clerk of the said chapelry." The defendant denied the title of the plaintiff to the office, and also his right to the payment of the sum.

Held, that this was a case in which the title to an incorporeal hereditament was in question within the meaning of 9 & 10 Vict. c. 95, and that the County Court had no jurisdiction. *Stephenson v. Raine*, 171

See INTERPLEADER.

## JURY.

*Nutting v. Nutting*, 89

See NEW TRIAL.

**LACHES.**

*Atties*, 31

See PRACTICE.

**LORD AND TENANT.**

ing unreasonable in a custom  
ndlord should be liable to the  
ant of a farm for a certain pro-  
e expenses incurred in draining,  
expenses were incurred with the  
onsent or not, if they were in-  
rly and according to the rules  
bandry. *Ludlam v. Mousley*, 38  
or rent, the tenant, although he  
ted possession of the premises,  
hat his landlord's title has ex-  
tice to quit given by the rightful  
the landlord, and notice to tenant  
urther rent; and he may further  
ght of the party claiming by the  
of the deceased person through  
ndlord came into possession as  
representative. *Mounney v. Col-*

ord has distrained for rent and  
opportunity of working out the  
the rent by a first distress, if he  
ich distress he cannot distrain

erefore, a tenant before distress  
tited an act of bankruptcy, and,  
isement of the goods for sale  
distress, the petitioning creditor  
a notice on the auctioneer not to  
h the sale, and the landlord had  
andoned his distress:  
at the landlord had no right to  
econd time, and that he could not  
a pound-breach in respect of the  
ess. *Bugge*, app., and *Mawby*,

Courts have jurisdiction under the  
on where either the value of the  
the rent did not exceed 50*l.* by  
*Earl of Harrington v. Ramsay*,

tenements may be recovered in  
Courts under 9 & 10 Vict. c. 95,  
re the annual rent payable in  
e tenancy does not exceed 50*l.*,  
e annual value does exceed that  
rompton, J., *dissentiente*. *Earl*  
*ton v. Ramsay*, ante, p. 154, con-  
*Earl of Harrington v. Ramsay*, 156

**NEW TRIAL.**

ried in the County Court before  
lone, who gave judgment for the

defendant. Subsequently a new trial was  
granted in general terms. Upon this the  
plaintiff gave notice of his intention of having  
a jury, and at the trial a jury appeared, when  
the judge refused to try the cause by such  
jury as he had given no leave for a jury, and  
the cause was accordingly struck out. Upon  
application to this court for a mandamus to  
compel the judge to try by a jury:

Held, that under the 79th rule of the new  
County Court rules, a party has an absolute  
right to a jury, notwithstanding the former  
trial was without a jury. *Nutting v. Nut-*  
*ting*, 89

**NONSUIT.**

*Stancliffe v. Clarke*, 13

See PARTICULARS OF SUMMONS.

**PARTICULARS OF CLAIM.**

*Howard v. Remer*, 161

See DISTRESS.

**PARTICULARS OF SUMMONS.**

The plaintiff took a public-house of the de-  
fendant, and agreed that he would purchase  
all his beer of defendant, and he gave a  
promissory note for 50*l.*, which sum was to  
be the liquidated damages in case of breach,  
and the note was not to be put in force  
unless the plaintiff broke the agreement.  
The defendant indorsed the note over, and  
the indorsees sued on it, and compelled  
plaintiff to pay the amount. Plaintiff then  
brought a plaint in the County Court against  
defendant. The summons and particulars  
stated that the plaint was brought for money  
paid by plaintiff for and on account of the  
defendant to A. and B. upon a judgment  
obtained by them, as indorsees of a prom-  
issory note of the plaintiff payable to the  
defendant or order, but for which promissory  
note plaintiff never received from defendant  
any value or consideration. On the trial  
before a jury defendant proved that plaintiff  
had ceased to buy his beer of defendant in  
February, 1850. Plaintiff offered evidence  
to show that since Christmas, 1849, the  
defendant had sent bad beer. This was  
objected to, but received. The defendant  
then applied to the judge to nonsuit the  
plaintiff, but this was refused, as the plaintiff  
declined to be nonsuited. The jury found  
for the plaintiff, and the defendant appealed.  
The case set out the direction to the jury,  
and the questions submitted to the Court of  
Appeal were—1. Whether the judge was

entitled to nonsuit the plaintiff without his consent? 2. Whether the evidence as to the quality of the bear was admissible?

Held, that the County Court judge had no power to nonsuit the plaintiff without his consent.

When a case is stated for the opinion of a Court of Appeal, the power of such court is not limited to answering the questions put in the case, but the court may look at the direction of the judge to the jury set out in the case, and if that be erroneous, may order a new trial. *Stencliffe, app., and Clarke, resp.*, 13

### PRACTICE.

Upon an interpleader summons the plaintiff put in and proved an assignment, by way of mortgage, to him of the goods in question seized by the bailiff. The defendant then proved the deed fraudulent as against creditors; the County Court judge held it fraudulent, and declined to hear the plaintiff's evidence tendered in reply to negative the fraud:

Held, upon an appeal to this court, that the County Court judge was wrong in rejecting the evidence tendered by the plaintiff in reply to negative the fraud. A new trial was directed. *Shaw v. Beck and another, Executors, &c.*, 67

Where an application for costs under sect. 13 of 13 & 14 Vict. c. 61, has been refused by a judge at chambers, a subsequent application to the court is in the nature of an appeal, and must be made within a reasonable time. In April, 1851, the plaintiff recovered in a superior court less than 20*l.* In June a summons for costs was taken out under 13 & 14 Vict. c. 61, s. 13, before a judge at chambers, who indorsed "no order." In January, 1852, an appeal was made to the court:

Held, too late. *Semble*, it ought to be made not later than the following term. *Meredith v. Gittins*, 31

### PRISONER.

A debtor, having judgment against him in a County Court, and an order made on him to pay the debt and costs by instalments, made default, whereupon a judgment-summons was issued, and on his non-appearance thereto, a warrant of commitment was issued against him under the 131st rule of the "Practice and Proceedings of the County Courts," which directs that "such warrant shall bear date on the day on which the order of commitment was made, and shall

continue in force for three calendar months and no longer." The warrant was issued for the arrest of the debtor, and he was committed to prison "for the term of ten days, commencing from the date of the arrest." The warrant was issued on the 19th of September, 1851. On the 16th of December following he was arrested and delivered into the custody of the keeper of the prison to which he was directed, who detained the debtor until the 25th of the same month, being beyond the three months during which the warrant was to be of full force:

The debtor brought his action against the gaoler for assault and imprisonment, and the latter pleaded a plea of justification under the warrant. To which the plaintiff replied that the warrant was issued under the 131st rule of the "Practice and Proceedings of the County Courts," which directs that the warrant shall continue in force for three calendar months, and that although he was arrested within that period, and was imprisoned for more than ten days, yet he was detained in prison seven days beyond the three calendar months during which the warrant had to run:

Held, on general demurrer, that the replication was no answer to that, although the warrant was to continue in force only three months from the date of the order of commitment, the debtor had been arrested within that period, and was imprisoned for the number of days specified in the warrant, notwithstanding that the term of imprisonment which the Court judge had ordered. *Hayes v. Sherring*, 58

### PROHIBITION.

Upon an application for a prohibition to a County Court (after trial) from proceeding with a plaintiff, on the ground that a title to land, this court refused to issue, it appearing that no objection to the proceedings was taken in the court below. *Sherring*, 58

See JURISDICTION.

### RAILWAY.

See CARRIERS.

### REPLEVIN.

The judge of a County Court, upon the removal of a plaintiff into a



the bond provided for by the 30th of the County Courts Act to the effect of to the other party to the desired by the act. The bond was forfeited, the obligee brought upon it:

that the bond was made to the judge, and might be sued on by him. That, by declaring in the court defendant in the present suit had irregularity. *Stansfield v. Hella-*

*s*, 140

See JURISDICTION.

### SET-OFF.

aimed as due to him a sum of £100, but reduced it below that by giving defendant credit for a balance sued in the County Court for £50. The defendant had never set-off, or allowed it as part of the balance of any account against the plaintiff's claim below 50*l*. The court judge thought at the trial he was without jurisdiction. The plaintiff then abandoned the excess above 50*l*. to the defendant; but the judge thought it was then to do so, and the plaintiff sued:

that the County Court judge had no jurisdiction under the circumstances, and, jurisdiction at the commencement of the action, the plaintiff could not at the time of the excess to give jurisdiction. *Wife*, app., and *Rhodes*, resp., 90

### STAMP.

By Court the plaintiff tendered in certain letters as proof of the contents, and the judge admitted that they were not stamped; and in whether they amounted to a judgment between the parties was left by the jury:

on appeal, that this was a question for the judge, and not of fact for the jury. The judgment, therefore, must be

reversed, so that if the letters amounted to a judgment they were inadmissible for want

of 3 & 14 Vict. c. 61, s. 14, the Court has power to order a nonsuit to be entered in effect a nonsuit is a judgment for the defendant. *Fuller*, app., resp., 101

### TOLL.

See JURISDICTION.

### TROVER.

The plaintiffs bought timber at Hull, which was by their direction delivered to the York and North Midland Railway Company at Hull, to be forwarded to the plaintiffs at Nottingham. The timber was carried over the Ambergate Railway Company to the Nottingham station, which belonged to the Midland Railway Company, and came into the possession of the Midland Company. The plaintiffs made a written demand of the timber on the Midland Company, with an offer to pay any expenses to which it was liable, but this was refused, and they were told that they could only have it by taking it back to the first station on the Ambergate line, five miles from Nottingham:

Held, evidence of a conversion by the Midland Railway Company. *Rooke and others v. The Midland Railway Company*, 81

### USAGE OF TRADE.

The plaintiff, a builder, sent in a tender, on application of defendant's surveyor to him among others; the tenders were all opened, and the plaintiff's turned out to be the lowest:

Held, that the judge was right, on evidence before him, in concluding that, according to the custom in the trade, and the conduct of the parties, the plaintiff's, being the lowest tender, had been accepted, although N. had no absolute authority to accept the lowest. *Pauling v. Pontifer and others*, 59

### WARRANT.

When an order for rehearing of an insolvent's petition has been made by the County Court, and the insolvent neglects to attend on the day of hearing, a warrant for his apprehension may be granted by the County Court under the 1 & 2 Vict. c. 110, s. 96, and 10 & 11 Vict. c. 102, s. 10. *Reg. v. Dowling*, 132

### WEIGHTS AND MEASURES.

By the 5 & 6 Will. 4, c. 63 (relating to weights and measures), s. 28, an inspector may enter any shop and examine all weights, measures, steelyards, or other weighing machines; and

if the weights or measures are unjust, the same shall be liable to seizure, and the person in whose possession they are found shall forfeit, &c.; and any person who shall have in his possession an incorrect or unjust steelyard or other weighing machine shall be liable to a like penalty.

By section 39 all actions for anything done in pursuance of the act, or in execution thereof, shall be brought in the county in which the cause of action arises; and the defendant may plead the general issue, and give the special matter in evidence, and that the acts were done in pursuance or by authority of this act; and if they shall appear to have been so done, &c., then the jury shall find for the defendant, &c.

By section 40 no plaintiff shall recover for any irregularity, trespass, or other wrongful proceeding made or committed in the execution of this act, if tender of sufficient amends shall have been made, &c.:

Held, that the inspector was not justified in seizing scales, though unjust; and that his acting under the *bona fide* belief that he was justified in doing so by the act did not entitle him to the verdict by virtue of section 39. *Thomas, app., and Stephenson, resp., 123*

## WILL.

Testator by his will bequeathed as fol

"To my son William I give all my and claim on household property in street, &c., belonging to the success the late J. H., on which I have a mort 1500*l.*; also all my claims on the ab houses situated, &c., occupied, &c.; I all moneys that I may have advanced at any time, to him, his heirs and assigns ever." At the time of the testator's there were certain arrears of interest standing on the mortgage of 1500*l.*, were claimed from the son (the plaintiff) the defendant as executrix. She further claimed a sum for repairs of the mort property done in the testator's lifetime.

Held, on appeal—First, that the of interest on the mortgage due at the tor's death passed with the principal son, and not to the defendant as executrix.

Secondly, that the defendant as executrix and not the plaintiff, was liable for the done in the lifetime of the testator. (*app., and Gibbon, resp., 94*)

## INDEX TO INSOLVENCY CASES.

### ACTION.

See PLEA.

### ASSIGNEES.

Sect. 142 of Common Law Procedure Act, enabling the assignees to continue actions commenced by an insolvent, applies only where the insolvency occurs after the action brought.

To a declaration upon an agreement whereby the plaintiff agreed with defendant, his execution creditor, that the defendant should take a printing-press, subject to the plaintiff's right to redeem on payment of 150*l.* and costs: alleging as a breach, that though plaintiff tendered the money defendant would not accept it or replace the printing-press, whereby the plaintiff lost the profits

of trade, and was wholly ruined and insolvent; the defendant pleaded that the cause of action accrued, and action brought, plaintiff petitioned in Court, and a vesting order was made.

Held, that the cause of action special damages alleged passed to assignees, and that the plea was good alleging any interference by them. *v. Collier, 1*

See INSOLVENT.

### DEBT.

To a declaration for money paid, &c., defendant pleaded that, after the accruing said debts and causes of action, and

petition for the protection of the insolvent process was duly presented to the Insolvent Court; that afterwards, before this suit, a final order for distribution was made; that debts in the declaration were before the filing of the said order that no description whatever of the debts, &c. in the said declaration or of the plaintiffs as creditors in the order, was contained or inserted in the order annexed to the petition; and that the names of the plaintiffs as defendants were omitted with the full knowledge and consent, and by and through the defendant and procurement of the plaintiffs: on demurrer, that the plea was bad to the action, the Legislature had provided that all the insolvent's creditors should be named and all placed upon the order; that all the insolvent's effects (those in the insolvent order absolutely, and those *do*) to be applied to their benefit; that the insolvent to be a free man; and that no evasion of any debt is to defeat this act to make the insolvent commit perjury to deceive the court and the creditors; and that to permit the insolvent to such a case to recover would be to countenance a fraud on the court and the creditors which the court ought not to countenance. *kin v. Manning*, 4

See SCHEDULE.

#### DISCHARGE.

See VESTING ORDER.

#### INSOLVENT.

*Illier*, 1

DEBTS, DEBT, PROTECTION.

#### INSOLVENT DEBTORS' COURT.

See REHEARING.

#### NEW SECURITY.

The insolvent debtor was adjudged to be entitled to the benefit of the act, but was to be in custody as to the debt of A. and on the expiration of twenty months. In custody it was agreed between A. and B. that the latter should charge the former out of custody by giving them a warrant of attorney to the effect that the insolvent's payment of their debt by instalments.

Upon this, the warrant of attorney was given, and the insolvent was liberated:

Held, that such warrant of attorney was void; and upon an application to this court for the purpose, it was set aside. *Ex parte W. A. Smith*, 29

#### PLEA.

To an action of debt, the defendants pleaded that, before the action, the plaintiff, being a prisoner, duly petitioned the Insolvent Court, and the court made an order vesting the plaintiff's real and personal estate and effects, before his discharge, in the provisional assignee. The plea then alleged that the debt had accrued after the order, and before the discharge:

Held bad on demurrer, for not alleging that the provisional assignee had interfered to recover the debt.

The same construction should be put on similar provisions in the Bankrupt and Insolvent Acts, and the express words of a statute may be contracted and confined to meet the mischief contemplated by the act. Per Pollock, C. B., Alderson and Platt, BB.; Martin, B. dubitante. *Jackson v. Burnham et Uzor*, 15

#### PREFERENCE (VOLUNTARY).

See VOLUNTARY PREFERENCE.

#### PROTECTION.

An insolvent to whom a protection had been granted after a verdict had been obtained against him in an action of tort, is not protected from arrest on a judgment signed after the protection granted.

A verdict in an action of tort was returned against A. on the 12th December, 1851. On the 17th he filed his petition. On the 12th a bill of costs in the action was delivered. On the 20th January following, he obtained his final order. Judgment upon the verdict was signed on the 5th of the following April, and subsequently A. was arrested upon a *ca. sa.* issued upon such judgment:

Held, that the final order so made under the 5 & 6 Vict. c. 116, s. 4, did not protect A. from such arrest; and that the words "protection from all process" in that section mean, from all process arising out of the subject-matter of the Insolvent Debtors Acts which do not deal with actions of tort. *Beavan v. Walker*, 8

## RE-HEARING.

The Insolvent Debtors' Court has no jurisdiction to re-hear the case of an insolvent originally heard before a County Court judge. *Reg. v. The Insolvent Debtors' Court*, 14

## SCHEDULE.

A. being indebted to B. and C. in two sums amounting to 80*l.*, gave them a promissory note for 80*l.* Shortly afterwards he took the benefit of the Insolvent Act, 1 & 2 Vict. c. 110; but his schedule did not set forth the note so given, though the original debt to B. and C. was inserted.

Held, on action by the indorsee of the note and a plea of discharge under the Insolvent Act, that the defendant was not discharged from the note, as it was not specified in the schedule. *Carr v. Kirkwright*, 13

See DEBT.

## VESTING ORDER.

An insolvent discharged after the vesting order, by default of the execution creditor, and with the consent also of the detaining ones, cannot sue a party acting as the servant of the provisional assignee, for the recovery of property passing under the vesting order, before an order of the Court under 1 & 2 Vict. c. 110, s. 44, for the redelivery to the insolvent of such property. *Kernot v. Pittis*, 20

Where, on the 24th of May, the 28th of the same month was appointed for hearing the argument upon a writ of error (so that it

was impossible for the defendant to comply with rule 63 of the Rules of P. by delivering the paper books four days before the day of hearing), it was held the plaintiff in error, having delivered paper books on behalf of the defendant not entitled to object to the defendant's error being heard until he had paid the plaintiff for them.

The discharge of an insolvent in custody by consent or default of the creditor and without adjudication, does not amount to a vesting order, but the property remains in the provisional assignee divested by order of the Insolvent Court, and, therefore, to an action of detinue by the insolvent under such circumstances, is a good defence that the defendant delivered the goods by authority of the provisional assignee. *Kernot v. Pittis*, 24

## VOLUNTARY PREFERENCE.

A person in insolvent circumstances as to the whole of his goods, except about the value of 5*l.*, by bill of sale to the defendant of his creditors, for a debt then due, and goods were conveyed away by night. More than three months afterwards his petition in the Insolvent Court, and a plaintiff was appointed his assignee brought this action to recover from the defendant the value of such goods:

Held, that the plaintiff was not entitled to recover, as the bill of sale was made three months before the filing of the petition and there was no evidence to show that the insolvent had, at the time he gave the bill, any view or intention of then petitioning the court for protection from his creditors. *Thoyts v. Hobbs*, 9

# UNTY COURTS CASES.

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## COURT OF QUEEN'S BENCH.

April 20, 1852.

### CROUCH v. NORTH-WESTERN RAILWAY COMPANY.

*of railway companies as common carriers—Effect of notice  
y will not be responsible for parcels unless the contents are  
—Packed parcels.*

*Western Railway Company published a notice, with which  
niff was acquainted, that they would not be responsible for  
parcels unless the contents were declared; and that they would  
y them unless the contents were declared, with the names and  
of the persons to whom they were sent; and that the senders  
taken to warrant that parcels were not packed parcels. The  
sent a parcel which the defendants knew to be packed, but no  
ars were given. The parcel was taken by the company. It  
to the court to say whether the notice and the sending of the  
der the circumstances were sufficient to prove a special contract  
1 Geo. 4 & 1 Will. 4, c. 68, s. 6 :*

*it was not sufficient, and that the defendants were bound to  
assent to the terms of the notice.*

plaintiff, Crouch, is a carrier at Birmingham, who collects  
els to send by railway; these, when collected, are packed  
reel and so sent to their destination and distributed. On  
of May last, and also on the 7th of June, some parcels  
at the plaintiff's office, and, according to his witnesses,  
in a canvas bag, and conveyed to the railway station  
en to Liverpool. On the arrival of the bag it was, on  
sions, immediately received by the plaintiff's agent, and  
him, and the goods (a packet of gold studs, another of  
nd another of other jewellery) were missed. The decla-  
ted that the defendants were common carriers, and that  
elivered to them certain goods to be safely and securely  
The second plea traversed this allegation. In other  
Carriers' Act was set up as a defence, to which there was  
on that the goods were stolen by a servant of the defen-  
rule had been obtained to show cause why the verdict  
d been found generally for the plaintiff) should not be  
and a verdict entered for the defendants on the traverse  
ond plea, or why there should not be a new trial on the

CROUCH  
v.  
NORTH-  
WESTERN  
RAILWAY  
COMPANY.

1852.

Carrier—  
Notice—Special  
contract.

ground of the evidence as to the felony being insufficient. In April, 1849, the defendants had published a notice that they would not be responsible for collected packages in omnibuses unless the contents were declared, with the names and addresses of those to whom they were sent, and that they would not be responsible for such packages, unless such declarations were made, and the senders of parcels would be taken to warrant that they were packed parcels.

*Wilkins, Serjt., and J. Brown* now showed cause.—As a question of evidence, there was sufficient to support a finding a felony on the part of the company's servants. At another point, the notice does not protect the company from liability. [JERVIS, C. J.—Crouch, jun., in his evidence said: "When I was asked to declare the contents, I said I could give the particulars." The goods were, however, left, and taken by the company. What is the effect of this? Is it a franchise? The notice at the end of it says, "You must warrant that it is not a packed parcel." Does that throw the responsibility on Crouch?] No. Crouch never consents to the terms of the notice. This notice is published after the cases which at the time the company could not charge more for packed parcels than for other parcels: (*Parker v. The Great Western Railway* (7 M. & G. 291; *Pickford v. The Grand Junction Railway Company*, 10 M. & W. 399; and *Crouch v. The North-Western Railway Company*, 2 Car. & Kirw. 789.) The company has a right to insist on the addresses being given: (*Parker v. The Great Western Railway* (7 M. & G. 292.) [JERVIS, C. J.—Might they not require a declaration of the contents and addresses, that they might not afterwards be made liable on the ground of felony by their servants, if articles said to have been lost might not have been there? 11 Geo. 4 & 1 Will. 4, c. 68 (the Carriers' Act), in section 4, that no notice shall be deemed to limit the liability at law of carriers; and in section 6 it is provided, that nothing in any special contract should be construed to annul, or in anywise to protect carriers from liability for felonious acts of servants, if notice is inoperative under section 4, and it is not brought under the proviso in section 6, as a special contract. Before this act was passed, a notice of this kind brought home to the parties would, in the absence of all contravening circumstances, have limited the liability of the company: (Story on Bailments, sects. 558-560.) The notice, therefore, must have this operation, that even though it be brought home to the party, it shall not limit the common law liability. Otherwise it has no operation at all. You must now, in order to make it a special contract, show assent on the part of the party to whom the notice is given. In *Austen v. The Manchester and Sheffield Railway Company* (20 L. J. 440, Q. B.), the defendant himself had signed the ticket. So also in *Chippendale v. Lancashire and Yorkshire Railway Company* (21 L. J. 22, Q. B.), and in *Shaw v. The York and North Midland Railway Company* (22 L. J. 100, Q. B.).]

wed that a company which had given a notice was not bound to carry according to their common law liability. Here there was evidence of any assent.

*Atherton, Q. C., and Cowling*, in support of the rule.—As to the question of evidence, the plaintiff was bound to show that a felony was committed, and that it was committed by some one or more of the servants of the company, and by which of them. As to the question of contract, the defendants rely not only on the notice, but on the fact of its being brought home to the plaintiff, but on the evidence of the younger Crouch as to what took place at the time the parcel was delivered to the company. The plaintiff knew the contents of the notice; and young Crouch was asked, as was always done, what were the contents of the parcel, and he answered, I cannot give them. The parcel, however, is delivered to the company; and it must be taken on this evidence, that inasmuch as the company knew that one of the terms of the notice was, that the company would not be responsible for any parcel unless the contents were declared, that he was content with and agreed to receive his parcels without being responsible for any loss.

*JERVIS, C. J.*—But the notice goes on to say, that the company will not carry unless the contents are declared; and then they do so, knowing the parcel was a packed one. Their remedy was to take, and as they did take, why should they not now be liable? Do they not by carrying waive the notice of non-responsibility? Before the passing of the Carriers' Act, it was necessary to prove that notice had been given; now more is necessary, namely, that it should be brought home to the sender of the goods. Railway companies are not necessarily common carriers, they are so *sub modo*. And here a notice, of which the plaintiff is proved to be cognizant, is given as to the terms upon which they would carry. And they must be taken to say to the plaintiff upon the delivery of the goods, "You, knowing the terms of the notice, must be taken to send them on those terms." [*JERVIS, C. J.*—Suppose a notice given into a man's hands, would that be an assent?] No; but here there is more shown, questions are asked. [*JERVIS, C. J.*—Yes, as to the particulars, but that is all. *WILLIAMS, J.*—What else does the plaintiff do but decline to accept the particulars?] He does something more; he acts upon the notice. [*WILLIAMS, J.*—I do not see that; suppose he had shaken his head. *CRESSWELL, J.*—If the servant had informed Crouch that the company would not be liable, and then the goods were left, perhaps in such case the company would not be responsible; but if he reminded him that the company would carry without a declaration of the contents, and then they left and carried, they must be taken to be liable. *JERVIS, C. J.*—Yes, it is a question of fact, and the burden is upon you to bring it to the court acting as jurymen.]

*JERVIS, C. J.*, delivered the judgment of the court.—The rule for a new trial must be made absolute. I was not satisfied with the verdict upon the issue of felony by the company's servants at

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Carrier—  
Notice—Special  
contract.

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NORTH-  
WESTERN  
RAILWAY  
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Carrier—  
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contract.

the trial. As to the other point, it being admitted, as it must be, that the notice itself was not sufficient to prove a special contract, it is for the defendants to make it out, and they have not done so to satisfy our minds.

*Rule absolute for a new trial on payment of costs.*

### COURT OF COMMON BENCH.

April 21, 1852.

ROBINSON v. GILL.

*Duty of clerk of County Court—Order to pay by instalments—Construction of 9 & 10 Vict. c. 95, sects. 27, 80, 92, 94.*

*No action lies against the clerk of a County Court for not preparing or for negligently preparing a notice to the defendant of an order against him, to pay a debt by instalments, which order was made by the judge at the time of delivering his judgment; such order being part of the judgment, and not requiring service: (confirming Elg Mould, 1 Cox & Macrae, p. 408.)*

THE defendant was clerk of the County Court of Chester, and this action was brought against him for alleged neglect of duty as such clerk. On the 24th of October, 1851, an action was brought by one Cook in the County Court of which the defendant was clerk, and 17*l.* recovered against the present plaintiff and another person, who were joint defendants in that action, and the judge ordered that the defendant (Robinson) should pay 3*l.* down, and the rest by weekly instalments. The clerk of the court prepared a notice of the order, but by mistake stated the instalments to be payable monthly, instead of weekly. The plaintiff not having paid the first instalment according to the order, Cook, the plaintiff in the County Court, issued a warrant of execution, under which the plaintiff's goods were taken. He thereupon commenced an action against the present defendant for breach of duty, the first count of the declaration being for a misfeasance, in making out a wrong notice; the second being for a nonfeasance. With respect to the judgment and order, an allegation in the declaration was "that it was adjudged that the plaintiff should recover a certain sum, and thereupon it was ordered that" the money should be paid by instalments. The declaration was demurred to generally.



*Cooling*, in support of the demurrer, argued that there is no such duty imposed upon the County Court clerk as is alleged in their count. Sects. 92, 94, and 95 of the County Court Act show that if default is made in payment of instalments, execution is to issue at once without any intermediate step. It is not the duty of the clerk to prepare a notice of the judgment: that being made in the constructive presence of the defendants, and the order to pay by instalments being a part of the judgment: (*Ely v. Mould*, 1 Cox & Macrae, p. 408.) But in this case one of the defendants might have been, and probably was, present in court at the time. In *Ely v. Mould* the order was for payment forthwith; but the act makes no difference between an order to pay forthwith, and an order to pay by instalments: they are equally a part of the judgment. The 114th of the New Rules of Practice directs that orders for payment of money shall be served; but it does not say in what manner; and it will not apply to this.

*Welsby*, contra.—The declaration alleges that it was adjudged that the plaintiff should recover a certain sum. This was a complete judgment; and what follows, “and thereupon it was ordered that” the money should be paid by instalments, is an order distinct from the judgment, and is in the nature of a warrant or precept within the 27th section of the act. The 92nd section orders that this order is not the judgment. A judgment imports payment forthwith, and during that the defendant is supposed to be present so as to have notice of it. But an order to pay by instalments is inconsistent with a judgment to pay forthwith, and is distinct from it, and comes within the 114th rule, which directs that “orders for payment of money or costs, or both, shall in all cases be served by the bailiff.” And if so, it was the clerk’s duty to prepare the notice for the bailiff to serve. And even if this be only directory, still it is imperative on the officer; and if he undertakes the duty and proceeds in it incorrectly, he is liable. In *Ely v. Mould* the money was to be paid forthwith, and it is a complete judgment. But here there is an order varying the effect of the judgment in favour of the then defendant.

*Cooling*, in reply.—The order is not distinct from the judgment. They must be assumed to have been made at the same time; and the judgment would not have been complete without an order as to how the money should be paid.

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—Payment by  
instalments.

*Cur. adv. vult.*

May 1.

JERVIS, C.J., delivered the written judgment of the court.—The question in this case is raised by a general demurrer. The declaration contains two counts; the first is founded on a misfeasance, and the second on a nonfeasance. We will consider the second first, as that raises a question on both counts which it will be well to consider unencumbered by the other point. After referring to the judgment and order set out, the first count avers, that after the making of the order, “it became and was the duty of the defendant,

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as such clerk as aforesaid, to prepare or cause to be prepared, a notice in writing of such order, to the intent that the same might be delivered or transmitted to, for the now plaintiff, as such defendant in the said cause, take due and proper care that no execution should issue on said court founded upon the said judgment and order, without notice having been first prepared and made out as aforesaid. The plaintiff in fact says that the defendant, not regarding him in that behalf, did not, as such clerk as aforesaid, prepare or to be prepared or made out any such notice in writing, but contrary wholly neglected and omitted so to do." It then states that "through the mere negligence and breach of duty of the defendant in that behalf, he, the plaintiff, did not at any time receive any notice of the said order, and was from thence continued until the time of committing the grievances next hereinafter mentioned, wholly ignorant of the making thereof, and by reason of the defendant's default in payment of divers of the said instalments and thereby directed to be paid as aforesaid." And then it states that the consequences followed, of which he complains. The alleged duty in this case is not a matter of averment and proof, and before the defendant can be made liable, he must have omitted to perform some legal duty. The statute of 9 & 10 Vict. c. 95, imposes such duty in terms. The 27th section, referred to by the plaintiff's counsel in the argument, being confined to the issuing of monies and warrants; the 92nd, 94th, and 95th, which enable the judge to order by instalments the payment of a debt, do not define the mode of proceeding for the recovery of the debt, but are silent upon this subject. But it is said the new rule, 114, imposes this burthen on the County Court clerk, because in all cases orders are to be served by the bailiff of the court; therefore the proper officer to make out the documents to be served on the defendant, is the bailiff, and the duty of preparing the orders therefore is cast on him. In our opinion, this rule has no such operation. It does not enlarge the duties of the County Court clerk beyond the provisions of the act of Parliament, but was framed merely for the purpose of pointing out by whom service was to be made on orders which require service within the provisions of the statute. The practice of the court, do not include judgments. The rules of practice drawn up by the judges are not an exposition of the statute; but, assuming that some orders for the payment of debts and costs may require service, they say such service shall be made by the high bailiff of the County Court. But it may be, that the order ought to have been served, that the defendant, in reference to the act or the new rules, may be liable. It is unnecessary to discuss the defendant's liability in that case, if, in our opinion, it was not necessary to serve this order; and we are of opinion that this point is well decided in *Ely v. Mould* (5 Mac. 408.) The first count of the declaration referred to in the second count states a judgment and order given for debt and costs "thereupon it was ordered that the debt should be paid by i

" The order for payment is part of the judgment, and it is unnecessary to consider what ought to have been done in the judgment. When the judgment was delivered, the order, part of the judgment, must have been known, and no service necessary. These observations dispose, also, of the principal question upon the first count, which proceeds upon the misfeasance alleged duty by the defendant, in making out a copy of the order so inaccurately that the plaintiff was misled and induced not to pay the instalment in due time. If the defendant was not bound to make out such notice, the fact of his having made an incorrect notice will not give the plaintiff a cause of action; we have already expressed our opinion upon that point. But the second count contains, also, a further allegation; namely, that it was the practice of the County Court for the clerk to make out a copy of the order for payment of the debt by instalments, to be served upon the defendant. If such a practice exists, it may be contended that the proceedings in question were irregular. But we need not give any opinion upon this point; for, whether they were regular or irregular, no action will lie in such a case for a mere irregularity of this description. It is observed, that the practice of the court is mentioned by the act of Parliament. It may be, in the form of the rule and the schedule of fees may have led, in fact, to the practice of serving a notice of judgment in such a case; but, in our opinion, they do not warrant such a practice and do not establish a legal necessity of pursuing such a practice. For these reasons we are of opinion the defendant has been guilty of any breach of duty, and therefore is entitled to judgment of the court.

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*instalments.*

*Judgment for the defendant.*

## COURT OF EXCHEQUER.

*February 7 and 9, 1852.*

STANSFIELD v. HELLAWELL.

*Replevin bond—9 & 10 Vict. c. 95, ss. 121, 127.*

*The judge of a County Court, upon the removal of a plaint in r into a Superior Court, took the bond provided for by the 127th of the County Courts Act to himself, instead of to the other p the action, as desired by the act. The bond having been forfei obligee brought an action upon it.*

*Held, that the bond was made to the judge as a trustee and n sued on by him. And also that, by declaring in the court abo defendant in the present suit had waived the irregularity.*

**D**EBT on bond in the penal sum of 1,759*l.* 15*s.* 2*d.*, the 10th of May, 1849; the defendants set out the on oyer, by which it appeared, that the defendants were to the plaintiff, who was the Judge of the County Court of shire, at Huddersfield, in the said sum of money; conditions if W. H. Hellawell should prosecute a certain plaint in th County Court in replevin, between Hellawell and others, with and without delay, and should prove before the court, by whic suit should be tried, that there was ground for believing th rent or damage in respect of which the distress was take more than 20*l.*, the bond should be void. The plea then al that the said County Court was duly established when th bond was made; that the plaintiff was the judge of the court; that the said plaint in replevin was in respect of a distr rent of arrear, in which plaint W. H. Hellawell was the plainti A. Eastwood and others the defendants; and after entry o plaint, and before the bond was made, W. H. Hellawell, to the removal of the said plaint into the Superior Court, declar the said County Court, and the plaintiff as judge thereof, th rent in respect of which the said distress was taken was more 20*l.*; and then instead of becoming bound with two sufficient ties, as the statute required, to prosecute the suit, &c., with and without delay, and to prove, &c., before the court in which suit should be tried, that there was ground for believing th rent was more than 20*l.*, the defendants made and entered into the plaintiff accepted from the defendants, illegally, the said

inducement to the plaintiff to assent to such removal of the plaint, and to make a return to any writ of *certiorari*, which said W. H. Hellowell should procure for so removing the said t, and which bond was made to the plaintiff, instead of being to the said A. Eastwood and others, the other parties in the plaint, contrary to the form of the statute, &c. Verification. Application admitting the establishment of the County Court, that the plaintiff was the judge thereof as alleged, with a *verse de injuriâ absque residuo causæ*. Then followed an assignment of breaches, by which it appeared, that the said County t was a court duly established under the 9 & 10 Vict. c. 95; that said plaint was in replevin in respect of a distress upon divers s, &c., for rent in arrear, in which plaint W. H. Hellowell the plaintiff, and A. Eastwood and others were the defendants; after the making of the said bond, the plaint was removed into Court of Exchequer of Pleas at Westminster; that W. H. awell did not prosecute his suit in the Exchequer with effect; that such proceedings were thereupon had in the Exchequer it was adjudged that W. H. Hellowell should be nonsuited, that A. Eastwood and the other defendants should go thereof out day, and have a return of the goods taken under the cess irreplevisable, with costs, whereby the bond had become ited. It was further alleged that the plaintiff commenced prosecuted the present action for and on behalf of, and for the fit of, A. Eastwood and others, the defendants in the original e.

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t the trial, before Platt, B., at the York Summer Assizes, a ict was found for the plaintiff, and damages to the amount ie costs which had been sustained and awarded in the replevin in the Exchequer, were assessed, leave being reserved to the ndant to move to reduce the damages to a nominal sum.

rule having been obtained accordingly:

l. Hill (*Cowling* with him) now showed cause, and contended that was a perfectly good and valid voluntary bond, and not avoided er the statute; the words of the statute are merely directory. e the tenant obtained the removal of the goods by his own act, landlord being no party to it, and the tenant received the entire est; the judge, by taking the bond to himself, merely took it trustee. Many instances may be cited of bonds given under a ute being held valid, although the requisitions of the statute not been strictly complied with. In the case of an administra- i *durante minore ætate cum testamento annexo*, which is not in the 21 Hen. 6, yet if the ordinary has taken a bond from the nistrator conditioned for the due payment of debts and legacies, each may well be assigned that, though he had more than cient to pay all the debts, he has not paid a legacy: (1 Wms. ra. b. 5, c. 4.) So also a replevin bond, with only one surety ad of two, as required by 11 Geo. 2, c. 12, s. 3, may be sued (He cited also *Blackett v. Crissop*, 1 Ld. Raym. 278; *Austin v. Howard*, 2 Marsh. 352; *Dunbar v. Dunn*, assignee, 10 Price, 54;

STANSFIELD and called the particular attention of the court to the judge  
v. the last case: (*Folkes v. Docminique*, 2 Str. 1137.)

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made.*

*Watson* (Hall with him) was called on to support the rule. The 121st section points out the only method by which a replevin can be legally removed, and it is a condition precedent that the preliminaries required should be complied with. A bond is illegal and void. (He cited *Morris v. Chapman*, Jones' Rep. 24; *Martin v. Blithman*, Yelv. 197; *Benfaye*, 10 Rep. 100, b.; *Wright v. Lord Verney*, 3 Dougl. 240.) It was an illegal act done by mistake, and no one can take advantage of it. The judge cannot be considered as a trustee, for it is evidently an error, and a man cannot be made a trustee by mistake, and by ignorance of the law.

*Cooling* was called on to reply, and cited Com. Dig. tit. "liament R." 23 and 25; *R. v. Pacey*, 2 B. & C. 322; *Green*, 6 M. & G. 872; *Edmonds v. Challis*, 7 C. B. 436.

*Cur. adv.*

#### JUDGMENT.

PARKE, B.—This was an action on a bond for the sum of £1,759l. 15s. 3d.; and there is a plea which states that the bond was given to the judge of the County Court with a condition that the plaintiff should prosecute a certain claim entered in the County Court, in which Hellawell was plaintiff, and Eastwood and others were defendants. The plea is that the plaintiff, with effect and without delay, to prove before the court in which the suit should be tried that there was a ground for believing that the rent or damages in respect of which the distress had been taken was more than 20l. Then it proceeds to state the contents of another bond, which was also in another proceeding; and it states that the bond was given in order to obtain the removal of a plaintiff to one of the Superior Courts at Westminster. The plaintiff, who was then the judge of the court; that the removal in respect of which the distress was taken was more than 20l. that it was entered into to the plaintiff instead of being made against other parties to the said plaintiff, Eastwood and others, contrary to the form of the statute. Then it is averred that it was made to the plaintiff being only as preliminary to the removal of the suit; and that the plaintiff accepted from the defendant illegally the said writing obligatory in the said first count mentioned, as an inducement to the plaintiff to assent to such removal of the said plaintiff, and to return agreeable to a writ of *certiorari* which Hellawell might procure for removing the said plaintiff, and so it was void. And there is a similar plea to the second count of the declaration; and there is no issue as to the truth of the allegations contained in the pleas. Then breaches are assigned, and the breaches assigned are, that the making of the said writing obligatory, the defendant Hellawell duly removed the suit out of the said County Court into the Court of Exchequer; that Hellawell declared in that court against the defendants in the court below, but did not prosecute his suit in the Court of Exchequer with effect, such proceedings were had therein the

adjudged that he should take nothing by his writ, &c.; and that the defendants should have a return of the goods under the writ irreplevisable with costs, &c., whereby the bond became forfeited. And he further says that the plaintiff commenced to prosecute the action on behalf of, and for the benefit of, the said Eastwood and others; and then there is another breach with regard to the second count. Upon the trial, my brother Platt reserved the point; the objection being taken, my brother Platt directed the damages to be assessed to the amount of the costs which Eastwood had sustained in that suit, and which were awarded in that suit. When in arrest of judgment there was a motion made that the writ was void under the statute, and if not void under the statute, the damages instead of being assessed at 178*l*. ought to have been nominal, merely because the plaintiff was the judge of the court, and had sustained no damages. With respect to the writ being void, we are clearly of opinion that it is not void under the statute. By the 121st section of 9 & 10 Vict. c. 95, there is a provision "in case either party to an action of replevin shall declare before the court in which the action shall be brought that the title to the corporeal or incorporeal hereditaments, or to any toll, market, franchise, or franchise, is in question, or that the rent or damage, in respect of which the distress shall have been taken, is more than the sum of 20*l*., and shall become bound in two sufficient securities to be approved of by the clerk of the court, in such sums as the judge shall think reasonable, regard being had to the nature of the claim and the alleged value and amount of the property in dispute, or of the rent, or damage, to prosecute the suit with effect and without delay, and so prove before the court in which the suit shall be tried, that such title is in dispute between the parties, or that there was ground for believing that the said rent or damage was more than 20*l*.; then, and not otherwise, the action may be removed before the court competent to try the matter, in such manner as has been accustomed." Now, by the 127th section there is a provision, that replevin bond to be given on the removal of any action, out of the County Court or upon staying the execution of any such warrant of possession as aforesaid, or on moving for a new trial, or to set aside a verdict, judgment, or nonsuit, shall be made to the other party to the action, at the cost of such other party, and shall be approved by the judge and attested under the seal of the court; and if the writ so taken be forfeited, or if, upon the proceeding for securing such writ, such bond was given, the judge before whom such proceeding shall be had shall not certify upon the record in court that the condition of the bond has been fulfilled, the party to whom the writ shall have been so made may bring an action of debt and recover thereon. Therefore, in this respect, the judge of the County Court did not follow the direction of the act, because he took the writ to himself, no doubt by mistake, instead of taking it to the defendants in the action. The pleas which aver that this was done fully and intentionally were disproved, consequently the verdict was found for the plaintiff on those pleas, and the question arises

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made.*

entirely on the record. We are of opinion that the points pointed out in the section of the statute are not in condition precedent to the validity of the bond which it should be taken. The only consequence is that the bond is properly removed. The bond itself is not thereby rendered void. It was a voluntary bond, and may be sued upon by the plaintiff of the court. We think that the bond is good, and that the arrest of judgment must be discharged. The only question is, what amount of damages the plaintiff is entitled to. Now, this is not an objection on the record, for there is no suggestion of breaches; the bond has clearly been broken. What damages the plaintiff sustained is a matter for the jury to decide. On the facts of this case there is, no doubt, sufficient evidence to show that the judge of the court in this case was a trustee for the opposite party, and the damages he recovers will be for the benefit of the party. There is clear evidence that, being trustee, he is bound to recover the full amount of the costs which the party he is trustee is put to. We are of opinion, therefore, that in this case the plaintiff must be considered as having sustained the full amount of the costs, and, consequently, both the arrest of judgment, and the rule also to reduce the damages, ought to be discharged. The suit was improperly removed to the County Court, no doubt, but then the court above has jurisdiction over the question, because they have a right to replevins properly brought before them, may have given judgment over the case; and then the irregularity in not removing the suit by a proper mode, viz., a *certiorari*, grounded on the fact that a proper bond, has been waived by the party declaring in the case above, and that court proceeding to judgment, the opposite party getting his costs. The proceedings were *coram judice* and irregularly brought here, that irregularity was waived, considering that the damages were properly given by the court to the party, and the plaintiff may sue on this bond as a trustee for the opposite party.

*Rule discharged.*



## COURT OF EXCHEQUER.

*February 21, 1852.*

## COUNTY COURT APPEAL.

(Before PARKE and PLATT, BB.)

STANCLIFFE, App., v. CLARKE, Resp.

*rity of summons—Nonsuit—Jurisdiction of the Court of Appeal.*  
*stiff took a public house of the defendant and agreed that he*  
*purchase all his beer of defendant, and he gave a promissory*  
*or £50, which sum was to be the liquidated damages in case of*  
*and the note was not to be put in force unless the plaintiff broke*  
*reement. The defendant indorsed the note over, and the*  
*es sued on it, and compelled plaintiff to pay the amount.*  
*ff then brought a plaint in the County Court against defendant.*  
*immons and particulars stated that the plaint was brought for*  
*paid by plaintiff for and on account of the defendant to A. and*  
*n a judgment obtained by them, as indorsees of a promissory*  
*the plaintiff payable to the defendant or order, but for which*  
*very note plaintiff never received from defendant any value or*  
*ration. On the trial before a jury defendant proved that*  
*ff had ceased to buy his beer of defendant in February, 1850.*  
*ff offered evidence to show that since Christmas, 1849, the*  
*int had sent bad beer. This was objected to, but received. The*  
*int then applied to the judge to nonsuit the plaintiff, but this was*  
*as the plaintiff declined to be nonsuited. The jury found for*  
*plaintiff, and the defendant appealed. The case set out the*  
*n to the jury, and the questions submitted to the Court of Appeal*  
*1. Whether the judge was entitled to nonsuit the plaintiff*  
*his consent? 2. Whether the evidence as to the quality of the*  
*is admissible?*  
*t the County Court judge had no power to nonsuit the plaintiff*  
*his consent.*

*case is stated for the opinion of a Court of Appeal, the power*  
*court is not limited to answering the questions put in the case,*  
*court may look at the direction of the judge to the jury set out*  
*case, and if that be erroneous, may order a new trial.*

*following case was stated from the County Court of*  
*shire, holden at Macclesfield.*

*peal to the Court of Exchequer between Robert Clarke,*  
*and Joseph Stancliffe, defendant:*

STANCLIFFE

v.

CLARKE.

1852.

*Summons—  
Nonsuit—  
Jurisdiction of  
Court of  
Appeal.*

This action was brought to recover the sum of 50*l.* in satisfaction of the larger sum of 57*l.* 1*9s.*, the plaintiff abating excess. The cause of action, as stated in the summons particulars, was for money paid by the plaintiff for the use and account of the defendant to F. Brindley, R. Brindley, Thomas, upon a judgment obtained by them in this Court in favour of the indorsees of a promissory note of the plaintiff and one J. Ward made payable to the defendant or order, but for which plaintiff paid the plaintiff or the said R. Ward never received from the defendant any value or consideration.

At the trial, which took place before a jury, on the 17th day of October, 1851, the following evidence was given by or on behalf of the plaintiff, namely,—that in September, 1849, the plaintiff sent one Barber to transfer or sub-let to him a public-house which was about to leave, having occupied the same for many years, and from year to year, to a person of the name of Latham; and on several interviews Barber referred the plaintiff to the defendant, to whom, as he stated, he was under a previous engagement to let the plaintiff accordingly called upon the defendant, and an agreement was then made which formed the basis of the following agreement:—Memorandum of an agreement made and entered into on this 17th day of October, 1849, between Joseph Stancliffe of Macclesfield, brewer, of the one part, and Robert Clarke of Macclesfield, innkeeper, of the other part, whereby the said J. Stancliffe doth agree to accept the said R. Clarke, and the said R. Clarke doth agree to accept all that messuage or tenement, dwelling-house and public-house, known by the name of “The Swan and the Necks,” situate at Christigate, in Macclesfield aforesaid, late the occupation of John Barber, together with all rights, liberties, appurtenances to the same premises belonging or appertaining, to hold the same unto the said R. Clarke as tenant from year to year or under the said J. Stancliffe, such tenancy to commence on the 17th day of the date hereof, yielding and paying therefor yearly and every year during the continuance of the said tenancy the sum of 50*l.* lawful British money, by even and equal quarterly payments on the 17th day of October, the 17th day of January, the 17th day of April, and the 17th day of July in each and every year, the first quarterly payment to be made on the day of the date hereof, the second quarterly payment on the 17th day of January next, and so on from quarter to quarter, the said rent being always payable one month in advance, clear of all deductions.—[Then followed cover by the said R. Clarke to pay the rent, rates and taxes, and to repossess the premises upon delivery up possession.]—And the said R. Clarke doth agree not to let or assign the said premises without the licence or consent in writing of the said J. Stancliffe, his executors, administrators or assigns, and to take at a fair valuation the whole of the furniture and fixtures now upon the said premises and purchased from the said John Barber; and also doth agree to purchase from the said Joseph Stancliffe the whole of the stock

ter which shall be drunk or consumed in or upon the said  
 es, and to keep a sufficient stock of malt liquors thereon :  
 d always, that in case of a breach or non-performance of  
 the above terms and agreements on his part, the said R. Clarke  
 forfeit and pay unto the said J. Stancliffe, his executors,  
 strators, or assigns, the sum of 50*l.* of lawful British money,  
 ecured by the joint and several promissory note of hand of  
 id R. Clarke and R. Ward, of Macclesfield aforesaid, inn-  
 , such money to be recoverable as and for liquidated damages.  
 ness the hands of the parties the day and year first before  
 l.

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 —  
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“JOSEPH STANCLIFFE,  
 “ROBERT CLARKE.

ness : John Skivvatt, clerk to Mr. Parrott,  
 solicitor, Macclesfield.”

t this agreement was executed by the plaintiff on the 17th  
 oher following, and that at the same time the note referred  
 ie summons and particulars was signed by the plaintiff and  
 as his surety, which note was as follows:—

“Macclesfield, 17th October, 1849.

a demand, we jointly and severally promise to pay to  
 eph Stancliffe, or order, the sum of fifty pounds for value  
 d.

“ROBERT CLARKE,  
 “ROBERT WARD.”

t immediately on the completion of these documents, the  
 f paid for the fixtures, and took possession of the premises,  
 ng the keys from Barber, to whom he communicated the fact  
 arrangement had been made. That up to this time no  
 to quit had been given or received by Barber, nor had  
 ie any act whereby his tenancy was determined. That  
 he middle of the month of November, the said Latham ap-  
 o the plaintiff for the rent which had become due from Barber  
 12th of October then last past. That in consequence of what  
 anspired, Barber and the plaintiff called upon Latham in a  
 ys, when, after paying his rent, Barber made certain pro-  
 by which he would have been relieved from all further  
 , but no arrangement was come to. That at the same  
 ew, the plaintiff told Latham that he had taken the premises  
 he defendant and Barber. That in January, 1850, the  
 f paid the defendant 5*l.* 13*s.* 4*d.* for a quarter's rent, less  
 y tax. That about the middle of the following month, the  
 f agreed with Latham to take a lease of the same premises  
 im for three years, to commence from the 12th of October  
 it, at an increased rent, and that such lease was accordingly  
 d and executed, bearing date the 12th of March, 1850.  
 ume was produced and given in evidence at the trial.) That

the liquor supplied, he discontinued dealing with altogether. On the part of the plaintiff, it was the show that the ale and porter supplied by the defend to Christmas, 1849, was in fact bad and unmark; however, objected, on behalf of the defendant, that was inadmissible "under the summons in the p. But the objection was overruled, the judge saying th he would direct the jury to find that fact specially. then given that the plaintiff had made frequent co the subject to the defendant, and that some of the was, in fact, of an inferior quality or in bad co portion had been returned or rejected. And lastly that in September, 1850, the defendant indorsed t note above mentioned, for value, to Messrs. Brindle who sued the plaintiff and Ward for the amount, judgment against them for 57L 19s. debt and costs plaintiff had satisfied the judgment. On the part of it was submitted that there was no case for the jur plaintiff must be nonsuited, for that the only quesit summons was whether there had been any conside promissory note mentioned therein; that the agr 17th of October was such consideration; that the plai his own showing, broken it by ceasing to deal with and by sub-letting to Royle and Ashworth; that in was liable for the 50L for which the note was made could not recover the same as money paid to the d the agreement never having been rescinded.

The plaintiff refusing to be nonsuited, the jud the case must go to the jury. No witnesses were defendant.

In summing up, the judge directed the jury (*int*)

The questions for the opinion of the court were—first, whether the judge ought to have nonsuited the plaintiff, notwithstanding the defendant's refusal to be nonsuited; secondly, whether evidence as to the quality of liquor supplied by the defendant to the plaintiff was admissible; thirdly, whether the judge was right in receiving evidence as to the letting of the premises by Latham to the plaintiff in February, 1851, the admissibility of such evidence not having been disputed at the trial.

*Welsby*, for the appellant, the defendant below.—First, it is admitted that the judge of a County Court has power to nonsuit without the consent of the plaintiff in the suit. At common law, if a plaintiff in an action chooses to say that he appears when called, he cannot be nonsuited. But, according to the statute 10 Vict. c. 95, s. 79, if a plaintiff fails to appear the cause may be struck out; and if he appears but does not make out his case, it shall be lawful for the judge to nonsuit the plaintiff. The intention of the Legislature probably was to do away with the power of going to a jury. [PARKE, B.—The statute means to give a power of nonsuiting in the ordinary course. It cannot be done without the consent of the plaintiff.] Secondly, the only question open within the terms of the summons was, whether there was a legal consideration for the making of the promissory note. The plaintiff seeks to recover back the amount he had paid to the defendant of the note as money paid to the defendant's use, on the ground that there was no consideration for it. The evidence as to the quality of the beer was not admissible. The stipulation that the plaintiff should buy his beer of the defendant was absolute. There was a condition that if the beer was bad the plaintiff should be released from this obligation. He cannot set up the badness of the beer as a defence, for that would only be a ground for a cross-action: (*Weaver v. Sessions*, 6 Taunt. 154.) [PARKE, B.—There is no express engagement here that the beer should be good; but it may be implied.] It may be implied as giving a right of action, but not as a limitation of the agreement. The agreement clearly was broken by the plaintiff not continuing to buy his beer of the defendant. There was a second clear breach when the plaintiff sub-let the premises contrary to his stipulation. [PARKE, B.—The plaintiff would not be justified in ceasing wholly to deal with the defendant because in some cases the defendant may send bad beer.]

(He was here stopped by the court.)

*Cowling*, for the respondent, the plaintiff below.—The contract was not an absolute contract. It was an implied term that the beer sent by the defendant should be good. The plaintiff offered evidence to show that the defendant made a practice of sending bad beer. If that were made out, the plaintiff would have been released from the necessity of dealing with him. The case of *Weaver v. Sessions* is not inconsistent with this view. It was not proved that there was a habit of sending bad malt. The allegation that the plaintiff sent "divers quantities of bad malt," would be

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what the plaintiff's case was.

*Welsby*, in reply.—The meaning of the second question to the court is, whether the evidence of the quality of the beer is admissible under the summons. It is submitted that it is admissible under the summons, for it was not relevant to the issue in it; for whether the beer was good or bad could not affect whether the note had originally been given without consideration. The summons does not inform the defendant what the issue of contention is. It says that there was no consideration for the note, and the case sought at the trial to be set up is, that there was good consideration for it, but that there was a suspension of the right to sue on it until there was a breach of the agreement under which the note was given, and that there had been no breach of the summons simply been for money paid for the beer. It is submitted that possibly this evidence might have been admissible under the summons in the largest sense, that there was no breach of the agreement, the evidence ought to have been rejected. —The evidence as to the quality of the beer was admitted, and the particulars admit it.] The direction of the judge was leaving the jury to infer that if the beer supplied by the defendant on any one occasion was bad, that that would justify the plaintiff in buying his beer generally elsewhere. [PARKE, J. not asked whether the direction is right. Can we say that the question put to us?] The direction is set out by the judge, and states the case. The court will look to the whole of the evidence, and merely to the questions put at the conclusion.

*Cowling*.—There is no averment in the case that the plaintiff was dissatisfied with the direction.

PARKE, B.—In this case certain points of law are presented to this court. They are contained in three questions put to the jury by the judge. With regard to the first question, whether

ked with reference to the plaintiff's summons and particulars of and, which are in this form. (He here read the particulars as d in the case.) We have some difficulty in saying what ruction is to be put upon them. If these particulars are ly construed, as a declaration would be, they cannot be sup- d, for it is not true, as alleged in the particulars, that the defen- received no value or consideration for the promissory note. The appears to be this: that in consideration that the defendant d demise to him a certain house, which he had no right to se, the plaintiff entered into a contract with the defendant that ould purchase of the defendant all the ale and beer that should nsumed on the premises. At the time that this agreement entered into, and bearing the same date, the promissory was given. There was a stipulation in the agreement, that se of any breach of that agreement the plaintiff should pay the int of the note as liquidated damages. The true account of ransaction, therefore, was, that the promissory note which the tiff has been compelled to pay to the indorsees was a note 1 for value, as it was in consequence of a demise made, which se was a benefit to the plaintiff, though the defendant had no r to demise, for the plaintiff got possession under the agree- ; and was in possession under it for a considerable time. If plaintiff is to be bound by his particulars in a strict sense, he ot recover under them. But I think that for the sake of ng substantial justice we must deal with these particulars as o with particulars in the Superior Courts. We must see, not her the particulars are accurate in every respect, but whether defendant could be misled by them. Now, looking at these culars, I do not believe that the defendant could be mistaken. particulars mean to say that the plaintiff has been compelled y a note which he was not bound to pay. The defendant r perfectly well all the circumstances of that note. There be a liberal interpretation put upon the words of the summons. plaintiff could not succeed if he had broken any of the con- ns of the agreement. We are therefore of opinion that it was etent for the plaintiff to show that no breach of the agreement taken place so as to entitle the defendant to indorse over the . On the third point it is clear that it was competent for the e to receive the evidence, though not properly admissible, as bjection was made to it on the part of the defendant at the . These observations would answer all the points included in formal questions put in the case. But we now come to a t upon which we entertain some doubt, namely, whether, ing at the act of Parliament which gives the appeal—the its 13 & 14 Vict. c. 61—we are to be strictly confined to the se questions submitted to us by the judge. Section 15 of act says, that "such appeal shall be in the form of a case," The judge does not confine himself to asking the three tions, and stating only facts sufficient to render those questions ligible, but he sets out his own direction, which it was com-

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question whether the liquor on one occasion was of a  
able quality. If the contract be literally construed, t  
the liquor is immaterial; but a reasonable construc  
put upon it. There is a duty on the part of the  
supply good liquor corresponding to the obligation on  
to buy of him. The plaintiff was not bound to t  
defendant malt liquor unfit to be drunk. If good liq  
sent the plaintiff might send back that portion; b  
follow that if bad liquor was sent on one occasio  
justify the plaintiff in avoiding the contract altoge  
dealing with other persons. As that part of the direct  
there must be a new trial.

PLATT, B.—In this case the plaintiff demised a p  
the defendant, at a certain rent. The plaintiff also  
two stipulations; one was, not to sub-let without th  
consent in writing; the other, not to purchase malt liq  
other person, but to purchase from the defendant  
liquor that was consumed on the premises. For thi  
securing the due performance of this agreement it  
that a promissory note should be given. It app  
evidence that the plaintiff ceased to purchase his  
defendant and did sub-let the house. There were, t  
clear breaches of the agreement. The defendant indo  
over, and the indorsees sued the plaintiff upon it and  
amount. The plaintiff thereupon brings the pres  
recover the amount so extorted from him, and he claim  
as money paid to the use of the defendant. He says in  
and particulars that the money was paid on a pro  
made by him, for which there was no consideration.  
me that it would be most unjust to bind down the pl  
very words of the particulars. The substance of th  
is. "I seek to recover from you the sum of money wh



hed to have the verdict of the jury on his case. It is in the plaintiff's own power to say whether he will be nonsuited, and if chooses to take the opinion of the jury, it is the duty of the judge, if the facts show that the plaintiff had no cause of action, to direct the jury to find for the defendant. On the second point, I am clearly of opinion that evidence as to the quality of the liquor supplied could be given. It seems it was put in for the purpose of showing that the plaintiff was not compellable to go on dealing with the defendant. As to the third point, no objection can be made to the admission of the evidence, which was not objected to at the trial. But I think that the direction of the judge was wrong. The question was put by him to the jury in such a way as to tend to mislead them. The statute 13 & 14 Vict. c. 61, s. 14, 15, says, if either party shall be dissatisfied with the determination or direction of the court in point of law or with the admission or rejection of evidence, &c., a case may be stated for the opinion of the Court of Appeal. The case is what we have to consider here. I see nothing in section 15 which confines the opinion of the court above to the questions put at the conclusion of the case; but I think that we are bound to see whether, on the whole case, justice has been done; and, as we find that the judge was wrong in his direction in point of law, that it is our duty to set a new trial.

*Welsby* applied for costs.

**PARKE, B.**—It must follow the usual rule. The successful party gets his costs.

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*Judgment reversed. New trial ordered.*

## BAIL COURT.

May 7, 1852.

(Before Mr. JUSTICE COLERIDGE.)

WILDE v. SHERIDAN.

*Jurisdiction—Arising of cause of action—Prohibition.*

*Where a plaintiff sues by leave of a County Court judge for a writ of prohibition, "in which the cause of action arose," by virtue of sect. 9 & 10 Vict. c. 95, the whole cause of action must have arisen in the district.*

*A., who resided at Norwich, drew there a bill of exchange upon B., who resided in London, at which place he accepted it, and transmitted it back to A. at Norwich, who there indorsed it over. The bill was dishonoured at maturity, B. paid the amount to the indorser, and then sued A. (by leave of the judge) in the County Court of Norwich upon it.*

*Held, that as B. accepted the bill in London, the whole cause of action did not arise at Norwich, and, therefore, that the judge of the County Court of Norwich had no jurisdiction to try the cause.*

THIS was a rule calling upon the plaintiff to show cause why a writ of prohibition should not issue to the judge of the County Court, prohibiting him from further proceeding in the cause.

An action was brought in the above County Court by the plaintiff as the drawer and indorser of a bill of exchange against the defendant as acceptor. The bill was drawn at Norwich by the plaintiff, who resided there, upon the defendant who resided in London, payable three months after date for 25*l.*, value received. The defendant accepted it, "per Robert and Co.'s, London." Having so accepted it, the defendant transmitted it to the plaintiff at Norwich, who in the course of business, paid it away, and on its being dishonoured, the amount to the holder. In order to bring the present case before the plaintiff applied to the judge of the Norwich County Court for leave to sue in such court pursuant to sect. 60 of the 9 & 10 Vict. c. 95, which enacts, that the summons may issue in any case "in which the cause of action arose." At the trial in the County Court it was objected, on the part of the defendant, that the judge had no jurisdiction, the cause of action having arisen in London and not at Norwich. This objection was, I

ruled, and a verdict given for the plaintiff, with a stay of execution. A rule *nisi* having been obtained by *Joyce*, *Phipson* now showed cause, and contended that the judge of the county Court had jurisdiction—that this being a bill not specially made “payable at Robarts and Co., London, and *not* elsewhere,” it was payable to plaintiff wherever he might be, and being at Norwich was payable to him there; that the cause of action was the non-payment of the bill at its maturity, and the contract itself the delivery of the instrument to a party who has a right to sue on it, which here was at Norwich: (*Buckley v. Hann*, 19 L. J. 1, Ex.; *Roff v. Miller*, 19 L. J. 278, C. P.; *Huth v. Long*, L. J. 325, Q. B.)

*Joyce*, contra, argued that the contract was the acceptance, which, being in London, the cause of action arose there; that to enable plaintiff to sue in Norwich, it must be shown that the entire cause of action arose there, which was not so in the present case.

*Cur. adv. vult.*

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COLERIDGE, J., now delivered judgment.—This was an action on the drawer of a bill of exchange, drawn at Norwich, accepted in London, payable at Robarts and Co.’s, and sent to the plaintiff at Norwich, in which jurisdiction the plaintiff sued by leave of the court, under the 9 & 10 Vict. c. 95. The question is, whether the whole cause of action arose within the jurisdiction of that county Court, and I am of opinion that it did not, assuming the cause of action to be made upon the contract and breach of it. It was urged against the rule that this being a general acceptance it bound the defendant to pay anywhere, and the breach therefore was at Norwich by the nonpayment; and further, that the acceptance was not perfect until the actual delivery to the defendant at Norwich, so that the contract also must be considered as having been made there. The case of *Buckley v. Hann* (19 L. J. 151) was cited in support of this latter position, in which the indorsement of a bill of exchange sent to London was held to have been made in Middlesex, so it was admitted that an acceptance in London in one jurisdiction and drawn at Billingsgate in another jurisdiction, was held complete in the former jurisdiction: (*Roff v. Miller*, 19 L. J. 278.) This case was decided soon after the other, and though they do not govern each other, and both appear to have been well decided. The acceptor of a bill has no property in it; before the acceptance he receives the drawer’s paper and puts his name upon it and makes his promise, and he may, before communication with the drawer, revoke it (*Cox v. Troy*, 11 Q. B. 474); but his promise, unless he revokes it, is complete, and takes effect from the time it was made. I am aware of Lord Bayley’s judgment in that case, but I think it is to be confined to the case then before the court. In *Smith v. M’Clure* (11 Q. B. 476), where the declaration by the drawer alleged a delivery to the defendant and an acceptance by him, demurred to because it did not go on to allege the delivery back, Lord

where it is made. All debts between the origin  
payable everywhere unless there is a special provision  
where a bill is sent from one country to the acceptor  
who there accepts it, it would be held the contract  
the country of the drawer. The contract in this case  
London, and therefore the whole cause of action is in  
Norwich; therefore the judge of the Norwich Court has  
no jurisdiction, and the prohibition must issue.

## COURT OF QUEEN'S BENCH.

## COUNTY COURT APPEAL.

*February 11, 1852.*

(Before PATTESON and WIGHTMAN, JJ.)

CANNON, App., v. JOHNSON, Resp.

*Notice of appeal—Power of judge to amend particulars.*

plaintiff's particulars in a plaint in a County Court alleged that defendant had deepened the bed of a river, and thereby varied the level, whereby the plaintiff had been deprived of his accustomed head of water at his mill. It appeared in evidence that the defendant had merely deepened the bed of the stream, for which the plaintiff recovered damages in an action; that the defendant then erected on his own land a dam, which, while it remained, kept up the head of water; that defendant afterwards removed the dam, on which the water fell, and the plaintiff then brought the present action. The County Court judge, thinking the particulars were not full enough to meet the evidence as to the loss of the water, directed an amendment, under rule 4 of the County Courts Rules, and inserted the words "and unlawfully lowered the dam," before the word "whereby," in the particulars. It was objected that the Judge, by Rule 104, could only amend in case of a variance between the allegations and proof, that there was no variance here, and that, consequently, the amendment was improper. It is held, that on an appeal from a County Court it cannot be taken as an objection to the jurisdiction of the Court of Appeal that the notice of appeal does not contain any statement of the grounds of dissatisfaction with the decision of the County Court judge, as required by the 151st rule of the County Court Rules.

It is held, that if a variance exists, though it may be immaterial, in proceedings in a County Court, the judge of such court has a discretion to amend under rule 104, and the Court of Appeal will not interfere with such discretion.

THE following case was settled by the judge of the County Court of Kent, holden at Canterbury. This was a plaint in the County Court of Kent, at Canterbury, entered on the 8th of October, 1851, and tried by a jury on the 14th of November following. The particulars of the plaintiff's demand, before the judgment made as hereinbefore mentioned, were as follows:—In the County Court of Kent, at Canterbury, between Benjamin

certain ditch more called Bushy Dyke, leading into the southern (or Abbott's Mill) branch of the same unto and into the said northern branch thereof; where the plaintiff, who during the whole time aforesaid hath been the occupier of a certain corn watermill, called Old Mill, in the parish of St. Mary, Northgate, in the city of London, and within the jurisdiction of this court, hath been the usual and accustomed head and supply of water, which his predecessors, occupiers of the said mill, have from the memory of man runneth not to the contrary, been to hold and enjoy, and have held and enjoyed, and the southern branch of the said public river, which supply the plaintiff's said mill, hath been, and still is, deprived of the accustomed supply of water. By means whereof the plaintiff hath been during the time aforesaid, and still is hindered from working and using the said mill, called Old Mill, as he hath been accustomed and is entitled to the same, and hath been and is deprived of the accustomed head of water thereto, to the great nuisance and to his great loss, damage and injury in his said trade of a miller, and to his great damage and interruption and enjoyment of his said mill, whereby the plaintiff sustained damage to the amount of 50*l*. Second: and on Saturday, the 17th day of August, 1850, you, the defendant, undertook and agreed with the said plaintiff, that the said defendant would forthwith erect and thenceforth maintain a tumbling bay at Bushy Dyke aforesaid, at such a level that no water should escape from the main branch of the said public river, called Bushy Dyke, whilst the water at the plaintiff's mill was under the top or head of the stone watermark and there. And for that you, the said defendant, have refused and still do neglect and refuse to erect and

plaintiff and defendant are both millers occupying mills on the River Stour, near Canterbury. The River Stour is divided into two branches, called the north and south branches respectively. The defendant is the owner and occupier of some land and a mill called Abbott's Mill, situate on the south branch of the stream. The plaintiff is the occupier of a mill called the Old Barton Mill, situate on the north branch of the stream, at some distance below Abbott's Mill. A short distance below the mill of the defendant there is a dyke called Bushy Dyke, which has existed more than twenty years, and connects the two branches of the river, and this dyke is situate wholly on land belonging to the defendant. It appeared in evidence that, on the 19th of August, 1850, a plaint was entered in the County Court at Canterbury, the particulars of demand in which were the same as those set forth in the first count, or part of the particulars in the present action, except that the trespasses were alleged to have been committed by the defendant, his servants and workmen, and to have continued from 1847 to the 8th of October, 1849. The action in 1850 was not tried, but the parties agreed that the plaintiff should have a verdict for 20*l.* damages, subject to the following terms:—

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of particulars.

at the County Court of Kent, at Canterbury.

“19th August, 1850.

*Johnson v. Cannon.*—It is agreed between the parties that a writ shall be taken for the plaintiff in this action, damages 20*l.* costs. But no execution shall be issued for the said damages, in default be made by defendant in forthwith erecting and forth maintaining a tumbling bay at Bushy Dyke, at such a height and on such a level that no water shall escape from the river through Bushy Dyke, whilst the water at the plaintiff's mill shall be under the top or head of the stone watermark and running bay there.

“CHARLES SANDYS, Plaintiff's Attorney.

“THOMAS THORPE DE LASSAUX, Defendant's Attorney.”

Accordingly judgment in that action was entered on the record in the County Court upon the above-mentioned terms. The defendant then gave the plaintiff parole licence to erect a temporary dam at the north end of Bushy Dyke, which the plaintiff accordingly did, and erected it seven inches higher than was sufficient to procure his mill a head of water at Old Barton Mill. The defendant then refused himself to convert this temporary dam into one of a permanent nature by puddling it with clay and straw, so as to render it effectual for the purpose of keeping the water from running away from the tail of Abbott's Mill through the dyke in the north branch. No tumbling bay was at any time erected by the defendant, and in consequence of the default in this respect, the plaintiff issued execution upon the judgment above mentioned. The amount of the judgment was paid into court, and the defen-

that month the plaintiff found that the mill was an and upon inspecting the dam it was found that it had by the defendant himself. The defendant cut down the dam, but subsequently raised it, so that on the d head of water was about the same as usual. The plain showed that he could not work his mill as he used sequence of the escape of water into Bushy Dyke i and that he was obliged to send corn to be ground at

The defendant did not question the plaintiff's right head of water at Barton Mill, but set up as a defence as it then stood, first, that he was not guilty; and, judgment had already been recovered in respect of t of action. After the case was closed on both sides ately before summing up, the judge expressed his there was no evidence of any agreement to erect the t that the terms agreed to amounted only to a conditio to issuing execution on the judgment in the first a condition not having been fulfilled, the judgment v that he (the judge) should therefore direct the jury their attention from that part of the particulars, s strike out the second count; and that as the particu full enough to meet all the evidence produced as to t water, he should, under the 104th rule, amend the p adding the words, "and unlawfully lowered the heig dam at the south end of the Dyke called Bushey Dy the words "the said northern branch thereof," an "whereby the said plaintiff," &c.

The judge then directed the jury to confine their the evidence of acts alleged to have been done since t namely, since September, 1850, for that for the prev plaintiff had received damages, and that if they were by the clearing of the stream, as alleged by the plaint



the County Court of Kent, at Canterbury, between Benjamin Johnson, plaintiff, and William Cannon, defendant. To Benjamin Johnson, the above-named plaintiff, Mr. Charles Cannon, solicitor, and to George Furley, Esq., clerk of the County Court.

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was at the trial of the above-named plaint in the County Court, at Canterbury, on the 14th day of November before Charles Harwood, Esq., judge of the said court, the judge amended the particulars of demand delivered by the said plaintiff, as your cause of action, by inserting therein words; now I the defendant being dissatisfied with the decision of the said judge in making the said amendment, in his direction thereon to the jury, do hereby give you to know that it is my intention to appeal against the said determination of the Court of Queen's Bench, Westminster.

*Notice of appeal  
—Amendment  
of particulars.*

On this twenty-second day of November, in the year of our Lord 1851.

“ WILLIAM CANNON.”

Questions for the court were, first, whether the judge was allowed to make the amendment under the circumstances; and, supposing the amendment to be proper, whether, upon the facts above stated, the plaintiff had a good cause of action in respect of the lowering of the dam and deepening the stream.

For the respondent.—The notice was insufficient; it did not state the grounds of appeal as required by rule 151. [WIGHTMAN.—The County Court judge had to sign the case, and the validity of the notice was a question for him. PATTESON, J.—I think that we have nothing to do with the notice. All rules require to be done is for the information of the court. The judge has chosen to think the notice good. It is not for us to give us jurisdiction.]

For the appellant.—The judge in the court below had no power to make the amendment. By rule 104 he has power to allow amendment in cases where there is a variance. In this case there was no variance. Moreover, the amendment was made after the defendant's case was closed, thereby depriving him of the opportunity of addressing the jury on the amended particulars. The court contended on the facts that the plaintiff had no cause of action.

For the respondent, was not called upon to reply.

PATTESON, J.—The first question is, whether the County Court has the right of making the amendment under rule 104? The words of the rule, which are very general, are as follows:—“ In the hearing of a variance appears between the evidence in the matters stated in any of the proceedings in the County Court, the judge may, at the discretion of the judge, and in such terms as he shall think fit, be amended, and such amendments, as well as amendments as to parties when ordered, shall be made in open court, and during the sitting of the court.” The

indeed by way of evidence, but as a cause of action have considered that the substantial cause of action the diminishing the plaintiff's head of water, and whilst it existed, prevented, was, on its being lowered. Still, I think that the judge had the right to make that at his discretion, and that we cannot interfere with his discretion. It is said that the defendant by being shut out of some defence that he might have, the defendant, on the amendment being proposed, allowed to go into some further evidence, or to have adjourned, the point should have been submitted to the judge would have exercised his discretion as to which he would have allowed the amendment to ought to have appeared on the face of the case the position was submitted to the judge. I cannot take to say that the judge had not the power to make this

WIGHTMAN, J.—I do not see what possible hardship has sustained or could have sustained by the defendant. His case is, that he had not been guilty of lowering the water if it had been lowered by him. The insert respecting the lowering the dam in the plaint was merely a supposed variance and formal difficulty. It seems to me that the judge had the power to make the amendment and that he was perfectly warranted in making the alteration; therefore, that the judgment of the court below should

*Rowe* applied for costs.

PATTESON, J.—When the judgment below is affirmed, it will follow as a matter of course, unless the contrary be shown.

*Judgment affirmed.*

## COURT OF QUEEN'S BENCH.

April 15, 1852.

MEREDITH v. GITTINS.

*Practice—Costs—Appeal from judge at chambers—Delay.*

*ere an application for costs under sect. 13 of 13 & 14 Vict. c. 61, has been refused by a judge at chambers, a subsequent application to the court is in the nature of an appeal, and must be made within a reasonable time. In April, 1851, the plaintiff recovered in a Superior Court less than 20*l*. In June a summons for costs was taken out under 13 & 14 Vict. c. 61, s. 13, before a judge at chambers, who endorsed "no order." In January, 1852, an appeal was made to the court.*

*d, too late. Semble, it ought to be made not later than the following Term.*

RULE had been obtained on the 28th January, calling on the defendant to show cause why the plaintiff should not be awarded his costs, pursuant to 13 & 14 Vict. c. 61, s. 13, although the sum recovered was only 13*s.* 3½*d.*; and the undersheriff had been used to certify. On the 11th June last a summons was taken before Coleridge, J., at chambers, for the same purpose; but the learned judge, considering that he had a discretion to exercise, according to the case of *Jones v. Harrison* (1 Cox & Macrae, 587), (since overruled by *McDougal v. Paterson*, 1 Cox & Macrae, 587); and *Crake v. Powell*, 1 Cox & Macrae, 587), refused the application, and endorsed upon the summons the words "no order." *T. Jones* now showed cause, and objected that the present application was too late; citing *Orchard v. Moxey* (18 L. T. 255), and *Asplin v. Blackman* (21 L. J. 78, Ex.)

*Figott, contra.*—This application is made within a reasonable time. In *Asplin v. Blackman*, two terms were allowed to go by, but yet the order was made. This is not in truth an appeal from a judge; it is an original application. [WIGHTMAN, J.—"No order" means summons dismissed; and from that decision you appeal.] In *Orchard v. Moxey*, the damages had been paid and waived, so that there was an acquiescence in the order of the judge.

LORD CAMPBELL, C. J.—I am of opinion that this application is too late. We can only hear it as an appeal from the decision of a judge at chambers, and after that decision the whole of Michaelmas Term was allowed to elapse without any application being made. Now these applications must be made within a reasonable

then "no order" is a refusal of the application, and can only come before the court by way of appeal, and within a reasonable time.

CROMPTON, J.—Under the 13th section of the Act, parties may apply either to the court or to a judge; they cannot go to both. Then, according to *Orchard v. Blackman* was the case of an original application.

*Rule*

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## COURT OF QUEEN'S BENCH.

June 11, 1852.

BARNES v. MARSHALL.

*County Court—Prohibition—Cause of action*

*The plaintiff, by a written contract, undertook to carry by canal to London, timber lying in a field a little distant from the plaintiff's wharf. When the defendant's horses were sent to haul the timber, the defendant's horses were made to haul the timber to the plaintiff's wharf; a plaintiff provided a team for hauling the timber to the wharf, and made an extra charge to that for the carriage to London. The plaintiff sued out a writ in S. County Court; the place of the timber was not within its district, neither did the*

ndant 50l. for carrying timber from Swindon to London by al, on the ground that the cause of action had not arisen within jurisdiction of the court.

It appeared from the affidavits that the plaintiff was a carrier by al, having a wharf at Swindon, and that the defendant resided Surrey; that the timber, in respect of which the action was ought, was lying in a field a short distance from the wharf, and removed to the wharf at intervals, sometimes by the defendant's horses, when they happened to be on the spot, and at other es the plaintiff would find a team, and make an additional ge for so doing beyond the rate (stipulated for by written tract) at which he had engaged to carry the timber to London. e contract was in the following terms:—

‘Memorandum,—I hereby agree to barge Mr. Marshall's timber n Swindon wharf to London, at any wharf there, at 16s. per string measure, to include all charges except wharfage.’

The plaint showed on its face that there were two items anting to 1l. 16s., for hauling timber to the wharf in the unt sought to be recovered. The plaintiff is a common carrier: *Living v. Todd*, 1 Stark. 72.)

*Hodges* showed cause.—The cause of action in this plaint arose in the district of the Swindon County Court, and consequently the summons might issue from it under sect. 60 of 9 & 10 t. c. 95. The plaintiff was entitled to claim the amount of the riage as soon as the timber was delivered to him to be carried: *Pickford v. Grand Junction Railway Company*, 8 M. & W. 372; *Pickford v. Pickford*, 8 M. & W. 443.) [By the COURT.—But the intiff was not entitled to sue for the carriage before the goods re conveyed.] As to the two items for hauling timber to the arf, there was a distinct contract, and the cause of action in pect of them arose clearly in the Swindon district: (*Harwood Lester*, 3 B. & P. 617.

*Bovill*, in support of the rule.—Under the 128th section of t 10 Vict. c. 96, where any item of the plaintiff's demand arises in the jurisdiction of the County Court, the Superior Court ot jurisdiction (*Wood v. Perry*, 3 Exch. 442), but the words he 60th section are especially different: the words “cause ction,” in sect. 60, mean the whole cause of action: (*Buckley ann*, 5 Ex. 43; *Wilde v. Sheridan*, 19 L. T. 126; *Grimbley ckroyd*, 1 Ex. 479.) As to there being a distinct cause of a in respect of the two items, that is not so, for it is denied there was any distinct contract.

BLE, J.—I am of opinion that this rule should be made abso- t As to the part of the cause of action for carrying the timber ondon from the wharf at Swindon, the plaintiff clearly has no. and for which he can sue until he has carried the timber to its ination. Then, as to the two items for hauling the timber to wharf, they do not constitute a distinct cause of action: for, e plaintiff, after hauling the timber to the wharf, had left it

DL. II.

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BARNES  
v.  
MARSHALL.  
1852.

Prohibition—  
Cause of action.

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COURT OF COMMON BENCH.

HILARY TERM.

January 31, 1852.

ABLEY v. DALE.

*Construction of s. 129 of 9 & 10 Vict. c. 95—Costs of less than 5l. recovered in tort.*

*A plaintiff, in an action for tort, brought before the par  
Vict. c. 61, after judgment had been given in his favour  
to one of the defendant's pleas, proceeded to trial as  
than 5l. damages, and the judge refused to certify.*

*Held, that he was not entitled to the costs of the demurrer*

**T**HIS was an action for assault and false imprisonment. The defendant pleaded,—first, not guilty; secondly, under a warrant of commitment issued by the Whitechapel County Court. Replication joining in plea and demurrer to the second, on which demurrer obtained the judgment of the court in his favour. The first plea was tried, and the plaintiff had a v.

*Mainstay* now showed cause.—The plaintiff is not entitled to the costs of the demurrer. The 3 & 4 Will. 4, c. 42, s. 34, enacts, that where judgment is given on any demurrer in any action, the party in whose favour such judgment is given shall have judgment to recover his costs in that behalf." The party who obtains judgment is to have final judgment for his costs, provided there are other issues; but where there are issues in fact to be tried, the judgment on the demurrer is only interlocutory. The 3 & 4 Vict. 4, s. 2, provides, "that where, in trespass, the plaintiff recovers verdict less than 40s., he shall not recover any costs without a certificate." [JERVIS, C. J.—The question here turns on the 129th section of the County Courts Act.] It is clear that the plaintiff is not entitled to costs under that section. It enacts, that if a verdict shall be found in the Superior Court for the plaintiff for more than 5*l.* in an action for tort, "the said plaintiff shall have judgment to recover such sum only and no costs." The final judgment can only be for such sum recovered; for there cannot be final judgments, one on the issue in fact, and the other on the issue in law. The non-assessment of damages on the issue in law, at the time of the trial of the issue in fact, is cause of error. JERVIS, C. J.—If the plaintiff had failed on the issue in fact, he would have had his costs on the demurrer. Is he to be in a worse position if he succeeds on the issue in fact? The words of the 129th section are, "no costs," without any qualification.

*Quain*, in support of the rule.—Under the statutes previous to the 3 & 4 Will. 4, c. 42, the question of costs depended on the amount of damages; and it was to remedy that anomaly that that Act was passed. It introduces a new rule. Section 34 is conclusive on the plaintiff's right to costs in this case; in the words of that section, he is a party in whose favour judgment has been given on demurrer, and he is, therefore, entitled "to have judgment to recover his costs in that behalf." In *Gregory v. The Duke of Devonshire* (3 C. B. 481), the Court of Exchequer Chamber decided that section 34 gives a right to a judgment and costs in cases of demurrer. [MAULE, J.—The principle pervading the County Courts Act is, that plaintiffs shall not bring actions in the County Courts which are fit to be tried in the Superior Courts. The criterion of fitness is a verdict for not more than 20*l.* in an action of contract, and for not more than 5*l.* in an action for tort; then the act says, that if a plaintiff brings a frivolous action in the Superior Court, he shall get no costs; and the finding of the judge is to be conclusive as to the frivolous nature of the action, when the judge refuses a certificate.] In the case of *The Mayor of Macclesfield v. Gee* (13 M. & W. 470), the plaintiff got judgment on a demurrer, and discontinued, and had to pay costs to the defendant; but it was held that he was entitled to the costs of the demurrer. Here, if the plaintiff had failed on the issue in fact, he would have got his costs on the demurrer. Surely he is not to be in a worse position if he succeeds. In *Reed v. Shrubsole* (7 C. B. 1), this court held, that if a defendant suffer judgment by

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distinguished from this case. The only distinction Denman's Act and the County Courts Act is that the words are, "he shall not recover any costs in verdict;" but the object of both statutes was to incident to the verdict for damages. But the plaintiff not claim the costs as incident to the verdict. [M 129th section has no reference to the Statute of any other statute. It says he shall not recover.] No doubt the plaintiff would be very glad to dis verdict in this case altogether.

JERVIS, C. J.—I am of opinion that this rule must be made absolute. The action was for a tort, and was brought in the County Court before the passing of 13 & 14 Vict. c. 61. At the trial the plaintiff recovered less than 5*l*, and the judge did not order costs. On demurrer now to take it that, since the verdict was obtained, has been entered to deprive the plaintiff of costs; and the question is, whether, under the 9 & 10 Vict. c. 95, s. 129, he is entitled to the costs of the demurrer? We need not consider the County Courts Act, 3 & 4 Will. 4, c. 42, because the County Court Act provides that wherever a jury by their verdict pronounce an action for damages, the plaintiff is to have *no* costs. How can we say that the plaintiff is to have some costs? The rule, therefore, will be discharged. Quain has, to save further expense, very properly moved for a writ of *certiorari*. If record may now be taken as if a suggestion had been made, in order to raise this question it will be discharged with costs.

MAULE, J.—I am of the same opinion. The action might have been brought in the County Court, and the plaintiff has recovered less than 5*l*. by the verdict of a jury. To consider what is the operation of the 129th section of the County Courts Act under the present state of fac



mode of construing a statute, unless there is some reason to the contrary,—are clearly sufficient to deprive this plaintiff of costs. The plain simple meaning is, that he is to have no costs at all, of any description or kind whatsoever, in the cause. But it is said that a restricted sense must be given to the words, and that “no costs” means no costs in respect of the verdict. It would be a considerable stretch of construction so to construe them; but if the obvious intention of the Legislature was that they should be so construed, no doubt the court would give effect to that intention. It is no one can doubt that the scope and intention of the Legislature was, that the act should be applied to deprive the plaintiff of the costs in question, as well as of all others; the words involve the inclusion of the costs of the demurrer as well as the costs of the action. Few acts were passed with greater confidence (which perhaps experience has justified) on the part of its framers, in its utility for this. The spirit of it is, that in certain cases the County Courts are the competent tribunals to decide all questions of law and fact, and that plaintiffs shall be compelled by inconveniences to pursue their remedy in all fit cases in those courts. Those cases (with some exceptions) all personal actions where the debt or damages claimed is not more than 20*l*. If the action be for tort, and the jury have found that the cause of action was under 5*l*., and the verdict is a conclusive pronouncement, that the case was one proper for the County Court, and not proper for the Superior Court. If the amount in dispute is so small that the action is not fit to be brought in the Superior Court the inconvenience is small, no matter how many or how complicated the questions of law or of fact may be. The plaintiff might here say, “A very important question of law was raised by this demurrer, and it has been determined in my favour.” The answer is, “If your case depended on a question of law, you might have argued it in the County Court.” The point might have been raised in a less formal manner, perhaps, but yet somehow; therefore it is nothing to the case that the case involves an important question of law. I think the manifest words and intention of the act take away all costs from the plaintiff, on whatever grounds or under whatever statutes they are sought to be recovered. I agree that the rule should be discharged without costs.

DESSWELL, J., and WILLIAMS, J., concurred.

*Rule discharged without costs.*

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—The words of the 11th section of the 13 & 14 Vict. c. 61, are similar to those of the 10th section of the 9 & 10 Vict. c. 95, and the decision in this case will equally apply to the provisions of the former statute.

LUDLAM v. MOUSLEY.

*Landlord and tenant—Farm draining—Custom*

*There is nothing unreasonable in a custom that the outgoing tenant of a farm for a certain expenses incurred in draining, whether the expenses were incurred with the landlord's consent or not, if they were incurred according to the rules of good husbandry.*

THIS was an appeal against a decision of the Court of Exchequer, in an action brought by the outgoing tenant of a farm against the landlord, under the following facts. The plaintiff, during his occupation of the farm, had incurred some tile and brick-draining, without the consent of the defendant; and he brought the action in the Court of Exchequer to recover a certain proportion of the money he had expended on account. It appeared that by his agreement with the defendant he was bound to cultivate the land according to the rules of good husbandry, and according to the custom of the county. The plaintiff gave evidence to show that the custom of the county was that where a tenant had expended money in tile and brick-draining, the landlord was to repay him five-sevenths of that money if it was incurred with his consent or not. For the defendant it was offered that the landlord was not to pay such proportion of the expenses, unless they were incurred with his consent. The judge told the jury that what was the custom of the county was in this case a matter of evidence, which they were to give credit to the witnesses on one side or the other. A verdict was given for the plaintiff. The appeal was allowed.

*Direction for the jury.—The judge said that*

is that involved in this custom? The tenant is bound to cultivate according to the rules of good husbandry; and it is fairly be implied that this draining was so done. The defendant's case here is, that however proper the draining may be he is not to be responsible for it, unless it is done with his knowledge and consent.] The custom, as found, is not so limited. [ERLE, J.—It must be an such tile-draining as a tenant holding under those terms may fully do. It was not suggested that this draining was superfluous waste.]

*Tomlinson*, contra, was not called upon.

COLERIDGE, J.—Here the tenant was, by the terms of the lease, to cultivate according to the rules of good husbandry. Now good husbandry, especially at the present time, might be considered to include draining. Is it then an unreasonable thing that the custom should exist of the landlord making an allowance more or less according to circumstances to reimburse the tenant for what he has expended in that way? Surely such a custom cannot be said on the face of it to be unreasonable, and if not, then the question of fact was properly left to the jury.

ERLE, J. concurred.

*Judgment affirmed, with costs.*

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v.  
MOUSLEY.  
—  
1851.  
—  
Landlord and  
tenant—  
Farm draining  
— Custom.

## COURT OF EXCHEQUER.

*April 27, 1852.*

GARNEY v. HARRIS.

*County Courts Extension Act—Construction of—Costs.*

§ 13 & 14 Vict. c. 61, s. 11, provides that if in any action of trespass a plaintiff shall recover a sum "not exceeding five pounds," he shall have no costs; and the 12th section provides, that if the plaintiff shall recover "a sum less than the sum in that behalf hereinbefore mentioned," and the judge shall certify, he shall be entitled to his costs. Plaintiff in trespass recovered the exact amount of 5*l*.

*Id.*, that the judge had power to certify for costs under the 12th section.

THIS was a case on the construction of the 13 & 14 Vict. c. 61 (the County Courts Extension Act.) An action of trespass and assault had been brought in the Superior Court, and the plaintiff had recovered a verdict, with damages, 5*l*. and the judge

recover that sum only, and no costs;" and the 12th provides, "that if the plaintiff shall in any such action recover a sum *less than the sum in that behalf hereinbefore* by verdict, and the judge or other presiding officer on such verdict shall be obtained shall certify, on the record, that it appeared to him at the trial that the plaintiff for which a plaint could not have been entered in any Court as aforesaid, or that it appeared to him at the time there was a sufficient reason for bringing the said action in which the said action was brought, the plaintiff's case shall have the same judgment to recover his costs as he would have had if this act had not been passed." If in this case could not have recovered his costs without the aid of the judge under the 11th section, because he had recovered a sum "not exceeding five pounds," and he cannot be entitled to such certificate under the 12th section, because the statute grants such certificate is only given where the sum recovered is "less than the sum in that behalf mentioned," that is, in a case of trespass less than a sum not exceeding five pounds. In the present case, the plaintiff recovered the exact sum of 5*l.*, whether it be more or less, but equal to a sum not exceeding 5*l.* No *casus omissus* on the part of the Legislature, but the Court is to adhere to the strict grammatical construction of the statute and not usurp the province of the Legislature by altering the meaning of the enactment to meet the presumed intention, a supposed omission. According to the grammatical construction "not exceeding five pounds" is the antecedent reference to the 12th section: (*Reg. v. The Inhabitants of the Parishes of Cornwall*, 5 N. & M. 241), decided that the provision of the 11th section, exempting from the stamp duties thereby imposed any indenture of apprenticeship, "where a sum or value

out one interpretation, as in the case relied on, the courts of law have no right to alter it, however absurd the conclusions to which the words lead; but if there are several ways of construction, then I think we are bound to take that most in accordance with the spirit of the act. There must be a difficulty of construction before we have any power to deal with an act, so as to interpret its meaning; but in this act I think it is quite clear that it was intended that the judge should have the power to certify in all cases in which, without his certificate, costs could not have been recovered; well, then, what is the meaning of the words "a sum less than the sum in that behalf hereinbefore mentioned?" It is a sum that would have been sufficient to entitle the plaintiff to recover costs.

ARKE, B.—I also think there should be no rule. According to the strict grammatical rule of construction, Mr. Collier may be right; but according to the rule acted on by the courts of law of many years, and a very valuable rule it is, we may depart from the strict grammatical construction when it leads to inconsistency, vagueness, or absurdity, to be collected from the entire act, and it would be so in such a case as the present.

LATT, B.—An act of Parliament should be read as anything would be, with a view to understand the true meaning; and the two sections must be so read, with a candid mind, and with a disposition to ascertain the true meaning of the Legislature. It cannot be believed, but that the Legislature intended that the judge should have the power to grant his certificate, when costs were taken away by the 11th section, and nothing could be more absurd than the state of affairs which would ensue if the argument relied on should be permitted to prevail; to avoid this absurdity, we must construe these sections, so as to give them a reasonable construction when taken both together; and if there appears to be a mistake, it seems to me we are at liberty to correct, if we can clearly discover what the intention of the Legislature was.

It is perfectly clear to my mind, that in this act, the words "less than," ought to be substituted for "not exceeding," and applying them in that sense, the argument in favour of this rule must fail.

MARTIN, B.—I am of the same opinion, and I think, that on a liberal construction of the words this application must fail, the law is, if the plaintiff shall recover a less sum than in that behalf hereinbefore mentioned, which means a less sum than would entitle him to recover costs without a certificate. We ought to construe the Acts of Parliament with a desire to arrive at the intention the Legislature had in framing them.

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—  
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Extension—  
Construction—  
Costs.

*Rule refused.*

*County Court—Duty of Clerk—Order to pay by instalments*

*It is not the duty of the clerk of a County Court to prepare an order made by the judge upon the defendant to pay by instalments. An order to pay by instalments is a part of the judgment. An action was brought in a County Court against A. in the absence of A. it was adjudged that the plaintiff was entitled to a certain sum, and an order was made that it should be paid by instalments. The clerk of the court prepared an order for the payment of the sum by instalments, and the same was served on A. His goods were afterwards seized according to the real order, not being paid. In an action brought against the clerk for breach of duty:*

*Held, that the clerk was not liable, there being no such breach of duty.*

THE defendant was clerk of the County Court of which this action was brought against him for alleged breach of duty as such clerk. On the 24th of October, 1851, an action was brought by one Cook, in the County Court of which the defendant was clerk, and 17*l.* recovered against the present plaintiff, who were joint defendants in that action. The court ordered that the defendants should pay 3*l.* down and 10*s.* weekly instalments. The defendant prepared a note for the payment of the instalments to be paid by weekly instalments. The plaintiff not having paid the instalments according to the order, Cook, the plaintiff in the County Court, issued a warrant of execution, and the plaintiff's goods were taken. He thereupon commenced an action against the present defendant for breach of duty, the declaration being for a misfeasance in making the order, the first being for a nonfeasance. With judgment and order, the allegation in the declaration was adjudged that the plaintiff should recover a certificate of costs.

the constructive presence of the defendants, and the order to pay by instalments being a part of the judgment: (*Ely v. Mould*, Exch. 819.) But in this case one of the defendants might have been, and probably was, present in court at the time. In *Ely v. Mould* the order was for payment forthwith; but the act makes no difference between an order to pay forthwith, and to pay by instalments: they are equally a part of the judgment. The 114th of the New Rules of Practice directs that orders for payment of money shall be served; but it does not say in what cases; and it will not apply to this.

*Welsby*, contra.—The declaration alleges that it was adjudged at the plaintiff should recover a certain sum. This was a complete judgment: and what follows, viz. “and thereupon it was ordered that” the money should be paid by instalments, is an order distinct from the judgment, and is in the nature of a warrant or precept within the 27th section of the act. The 92nd section shows that this order is not the judgment. A judgment imports a payment forthwith, and during that the defendant is supposed to be present so as to have notice of it. But an order to pay by instalments is inconsistent with a judgment forthwith, and different from it, and comes within the 114th rule, which directs that orders for payment of money or costs, or both, shall in all cases be served by the bailiff.” And if so, it was the clerk’s duty to prepare the notice for the bailiff to serve. And even if this rule is only directory, still it is imperative on the officer; and if he undertakes the duty and proceeds in it incorrectly, he is liable. In *Ely v. Mould* the money was to be paid forthwith, and it is a mere judgment. But here there is an order varying the effect of the judgment in favour of the then defendants.

*Cowling*, in reply.—The order is not distinct from the judgment. They must be assumed to have been made at the same time; and this judgment would not have been complete without an order as to how the money should be paid.

*Cur. adv. vult.*

*Saturday, May 1.*

JERVIS, C. J., delivered the judgment of the court.—The question in this case is raised by a general demurrer. The declaration contains two counts; the first is founded on a misfeasance, and the second on a nonfeasance. We will consider the second first, as it raises a question on both counts which it will be well to consider unencumbered by the other point. After referring to the judgment and order set out, the first count avers, that after the making of the order, “it became and was the duty of the defendant, as each clerk as aforesaid, to prepare, or cause to be prepared and made out, a notice in writing of such order, to the intent and in order that the same might be delivered or transmitted to, or left to the now plaintiff, as such defendant in the said cause, and to take due and proper care that no execution should issue out of the said court founded upon the said judgment and order, without such

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instalments.

reason thereof made default in payment of five instalments thereon, and thereby directed to be paid. And then certain consequences follow, of which the allegation of duty in this case is not a matter of proof, and therefore to make the defendant liable, omitted to perform some legal duty. The statute of c. 95, imposes no such duty in terms. The 27th section, by the plaintiff's counsel in the argument, being the issuing of summonses and warrants; the 92nd, the 93rd, which empower the judge to order by instalments to pay a debtor, and define the mode of proceeding for the recovery of a debt, being silent upon this subject. But it is said the duty is cast upon the County Court clerk, because all orders, &c. are to be served by the bailiff of the court, and the clerk is the proper officer to make out the orders to be served by the bailiff, and the duty of preparing the orders, is cast upon him. In our opinion, this rule is not in operation. It does not enlarge the duties of the clerk beyond the provisions of the act of Parliament which framed merely for the purpose of pointing out by what officer service was to be made. The orders which require service are to be made by the provisions of the statute, or by the practice of the court, and judgments. The rules of practice drawn up by the court are an exposition of the statute; but, assuming that the payment of money and costs may require service, and that service shall be made by the high bailiff of the court. But it may be, that if the order ought to have been made by the defendant, without reference to the act or the rules, he would be liable. It is unnecessary to discuss the defendant's case, if, in our opinion, it was not necessary to make an order; and we are of opinion that this point is w



proceeds upon the misfeasance of the alleged duty by the defendant, in making out a copy of the order so inaccurately, that the plaintiff was misled and induced not to pay the instalment in due time. If the defendant was not legally bound to make out such notice, the fact of his having made out an incorrect notice will not give the plaintiff a cause of action; and we have already expressed our opinion upon that point. But this count contains, also, a further allegation, namely, that it was the practice of the County Court for the clerk to make out a copy of the order for payment of the debt by instalments, to be served upon the defendant. If such a practice exists, it may be contended that the proceedings in question were irregular. But we need not give any opinion upon this point; for whether they were regular or irregular, no action will lie in such a case for a mere irregularity of this description. It is observed, that the practice of the court is mentioned by the act of Parliament. It may be, that the form of the rule and the schedule fees may have led, in point of fact, to the practice of serving a notice of judgment in such a case; but, in our opinion, they do not warrant such a practice, and do not establish a legal necessity for pursuing such a course. For these reasons, we are of opinion the defendant has not been guilty of any breach of duty, and, therefore, is entitled to the judgment of the Court.

*Judgment for the defendant.*

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*Duty of clerk—  
To pay by  
instalments.*

## COURT OF EXCHEQUER.

*May 7 and June 26, 1852.*

HICKIE and ANOTHER v. SALAMO.

*County Court—Costs—9 & 10 Vict. c. 95, ss. 128, 129: 13 & 14  
Vict. c. 61, s. 17.*

*In an action by two plaintiffs, where one of them resides within and the other beyond twenty miles of the defendant, the Superior Courts have concurrent jurisdiction with the County Courts.*

**I**N this case the plaintiffs having brought this action in the Superior Court, obtained a verdict for 8*l.* 12*s.* 8*d.*

*J. Gray* now moved for a rule calling on the defendant to show cause why the plaintiff should not, notwithstanding the amount of the verdict, recover his costs. It appeared that one of the plaintiffs resided at a distance greater and the other at a distance less than

to the cases in which it has been held, that when resides within the jurisdiction, the court will not re for costs.

*J. Gray*, contra, cited *Parry v. Davis and Ux.* 1 379; *Doyle v. Lawrence*, 2 L. M. & P. 368. *Cu*

#### JUDGMENT.

PLATT, B.—The plaintiffs having recovered in verdict for a sum recoverable in a County Court, m on the ground that one of the plaintiffs lived at a dis and the other at a distance less, than twenty m defendant. On showing cause, counsel for the defer that the plaintiffs did not bring themselves withir ment prescribed by the 9 & 10 Vict. c. 95, s. 128, f considered as constituting one plaintiff, then, acc interpretation clause (142), as being two plaintiffs, i predicated of them that they dwelt more than a dista miles from the defendant, as in either case they d within as beyond the distance; that this might be a but unless they came within the language of the l the court had no jurisdiction to grant costs. By Vict. c. 95, s. 128, it is enacted that "All actions the passing of that act might have been brought Majesty's Superior Courts of Record, where the p more than twenty miles from the defendant might b defended in any such Superior Court at the electio as if this act had not been passed." Under this act in practice applied to the court under the 129th secti deprive the plaintiff of his costs; and it was upor stating. amongst other things that he and the n

is, that the said action was brought for a cause of action, in which concurrent jurisdiction is given to the Superior Courts by the 128th section of the 9 & 10 Vict. c. 95, in which case the court in which the action is brought, or a judge at chambers may, by order, direct the plaintiff shall recover his costs. Under the 17th section 13 & 14 Vict. c. 61, therefore, the plaintiff was entitled to obtain his costs; but surely the facts which would enable him to resist successfully the defendant's application to deprive him of his costs under the 9 & 10 Vict. c. 95, would, under the 13 & 14 Vict. c. 61, suffice to establish his right to recover them. The cases in which that right is to attach are not changed, they are still those in which concurrent jurisdiction is given to the Superior Courts by the 128th section, 9 & 10 Vict. c. 95. The same state of facts, therefore, that would have entitled the plaintiff to his costs before the passing of the 13 & 14 Vict. c. 61, would, providing he satisfied the court or a judge of their competence, equally entitle him to costs now: (*Parry v. Davis and others*, 1 L. M. & P. 379.) There the affidavit on the part of the defendant omitted to state that more than one of them resided within twenty miles of the plaintiff, and Lord Cranworth, then Lord Rolfe, held, that as the 128th sect. of the 9 & 10 Vict. c. 95, gave to the Superior Courts a concurrent jurisdiction, the plaintiff was entitled to his costs. In *Doyle v. Lawrence*, in the second volume of the same reports, 368, the Court of Common Bench adopted Lord Cranworth's decision, and held that the residence of one of the defendants more than twenty miles from the plaintiff made the case one of concurrent jurisdiction within the section. The same principle applies to a plurality of plaintiffs. We therefore think that as one of the plaintiffs in this case resided more than twenty miles from the defendant, the jurisdiction was concurrent, and the plaintiffs are entitled to the costs. The rule must be absolute.

*Rule absolute.*

HICKIE  
AND ANOTHER  
v.  
SALAMO.  
—  
1852.  
—  
Costs—  
Jurisdiction.

County Court jurisdiction—9 & 10 Vict. c. 95, s. 58—6

*The owner of a wharf brought an action against the adjoining wharf for obstructing his premises, by permitting to overlap them. The defendants pleaded a custom of the river that the proprietors of wharves may overlap their premises for a reasonable time while unloading. This custom was traversed; and there was also a new assignment, that the wharf was for an unreasonable time:*

*Held, that the action shewed no claim to an incorporeal franchise, so as to bring the case within 9 & 10 Vict. c. 95, s. 58, that the County Courts have jurisdiction to try the matter.*

CASE.

**D**ECLARATION alleged that plaintiff, before committing the grievances, was possessed of a wharf called Ratcliffe Cross Wharf, adjoining to and along the river Thames, upon which he then carried on his trade as a wharfinger; and all the liege subjects of our Lord the King before and at the times aforesaid, actually, and of right ought to have, a free passage and navigation up and down the river for their ships, vessels, &c. going to, staying at, or from the said quay or wharf upon lawful occasions, accustomed to frequent the same with their ships, and boats, &c. with goods, wares, &c. for wharfage fees on their behalf, payable, &c.; yet defendant wrongfully and without, and otherwise than for the purpose of loading goods and merchandise, &c. at the said wharf, moored, placed, or fastened divers ships and vessels in the river, so that the bows and divers parts of the said ships and vessels were before, across, and alongside of, and overlapped the wharf in the way and passage aforesaid for an un-

mes. And defendants further averred that by an ancient and able custom from time immemorial used and approved of in the river, and by all persons frequenting and using the same, and wharfs, &c. and by the possessors, &c. any ship or vessel ing to a quay or wharf on the banks of the said river lawfully, and any occupier lawfully may suffer or permit, or cause any

or vessel coming to his wharf for the purpose of loading or ading, to overlap the adjoining wharf or quay, such adjoining rf or quay not being a public wharf or quay, with the bows igging of such ship or vessel; and if the space before such ining wharf or quay so intended to be overlapped is vacant and xcupied by any other ship, &c. and defendants at times, &c. g occupiers of the wharf adjoining plaintiff's, suffered the said s, &c. which then lawfully came to the said wharf and quay of lefendants for the purpose of being loaded and unloaded, &c. verlap the said wharf, &c. so adjoining to, &c. with the bows, of the said ships, &c. the space before the wharfs of the tiff at the said times being unoccupied, &c. and the said wharf quay of the plaintiff not being at any time a public open rf, with the bows or rigging, as the defendants lawfully might.

*Application*—1, similitur; 2, Traverse of custom; and new nment. That defendants did the act complained of otherwise

for the proper loading or unloading goods, wares, or merdise, or other things at the said wharf, &c. moored, placed, fastened the ships, &c. so that other parts of the said ships the bows and rigging, to wit, the bodies, prows, stems, and r parts of the said ships lay before, &c. and overlapped, &c. also that the defendants at other times than when the space vacant and unoccupied, and not for the purpose of loading or ading, &c. moored, placed, and fastened, &c. ships, &c.

*joinder to the new assignment*—Not guilty.

he action was tried before Pollock, C. B. at the sittings after Michaelmas Term, when a verdict was returned for the tiff, damages 40s. The plaintiff's counsel then applied to the ed judge who tried the cause to certify that the cause was a ne to be tried in a Superior Court, and that it was brought y a right, which his lordship refused to do.

ush having obtained a rule to show cause why the Master dld not be at liberty to tax the plaintiff's costs, and why the tiff should not recover the same pursuant to the 13 & 14 c. 61, s. 13:

*Lawkins* now showed cause, and contended that the only queswas, whether the title to an incorporeal hereditament here e into question? The claim was one over which the County rt had jurisdiction, and there was nothing in the acts to vent the cause being tried there; the action was, in fact, for age done, and not for a breach of any right.

ush, in support, contended that the cause involved a claim to incorporeal hereditament or franchise, and that although the 3 section of the 9 & 10 Vict. c. 95, did not actually include

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DAVIS  
v.  
WALTON  
AND ANOTHER.  
—  
1852.  
—  
*Jurisdiction—  
Question of  
right.*

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COURT OF QUEEN'S BENCH

November 8, 1852.

STEWART v. JONES.

*Jurisdiction.*

*By the 1 Vict. c. 33, a right to recover a paving rate in the Superior Courts of Record at Westminster, was given. Held, that the County Court had jurisdiction, and that it was entered therein for the recovery of the rate.*

C. POLLOCK moved for a prohibition to the County Court of Cheshire, to restrain him further in the above cause. The plaintiff was for 8*l.* 19*s.* 8*d.* alleged to be due from the defendant under 1 Vict. c. 33, for sewerage and paving, &c. the rate to head. Sect. 18 of the act gave a power of recovery by distress or by action in any of Her Majesty's Superior Courts of Record at Westminster, and the learned counsel contended that the jurisdiction of the local courts at the time of the act was thereby ousted, and that it was not the in-

County Courts in all cases of debt below a certain amount. LERIDGE, J.—And this case is not within any of the exceptions in the 28th section.] He then referred to sects. 3 and 58 of the 10 Vict. c. 95; The Apothecaries' Act; *Foster's case*, 11 Co. p. 61a.; *Williams v. Pritchard*, 4 T. R. 2; *Owens v. Breese*, 2x. 413, 916.

LORD CAMPBELL, C. J.—Having heard the arguments and the authorities cited, I am only confirmed in the impression that I had when the motion was proposed. By the local act of 1 Vict. c. 33, an action of debt was given for the recovery of the rate in a Court Record, then by a subsequent act, the 9 & 10 Vict. c. 95, it was enacted that in all pleas of personal actions where the debt or damage was not more than 20*l.* the County Courts should have jurisdiction. This was a personal action within the limited amount, and comes within the meaning of the enacting clause, and it is not within any of the exceptions. Then why should we not give the same construction to the case? There is nothing at all to show that it was the intention of the Legislature that County Courts should not have jurisdiction over such a cause of action as this. It is more for the convenience of the subject that they should have had jurisdiction. The 1 Vict. c. 33, is relied on, but it is a strange distinction to draw between Courts of Record and Courts of Record in Westminster Hall.

LERIDGE, J.—I quite agree with Mr. Pollock that there could have been no mode of recovering this rate by action but by the 1 Vict. c. 33. By that act, the right became a personal action, and when the right was enforced it became a plea of personal action, and jurisdiction over such rights is given by the 10 Vict. c. 95, s. 58, to County Courts. The 128th section is equally strong to show that.

NIGHTMAN and ERLE, JJ. concurred.

STEWART

v.

JONES.

1852.

Jurisdiction.

*Rule refused.*

(Before Mr. JUSTICE CROMPTON.

*Ex parte* HENRY WILTON.

*Criminal information.*

*Upon an application for a rule for a criminal information for a County Court judge, the court refused to interfere, it being suggested that the judge acted from any corrupt motive.*

ON a former day (Nov. 6) *Hawkins* moved for an order upon one of the judges of the County Court why a criminal information should not be filed against him for misconduct in his office. It appeared from the proceedings which this motion was made, that the defendant (*Hawkins*) having attended upon a judgment surduly sworn and questioned by the judge as to his liability for the amount of debt as ordered; and it was alleged in support of this motion, that as he was explaining the reasons for having done so, he was stopped by the judge who (on the suggestion of the plaintiff) committed him for a month. It was suggested that the judge had acted from any corrupt motive, but it was contended that this conduct of the judge was not such a dereliction of duty as to entitle the plaintiff to the present application.

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His LORDSHIP to-day said he had considered the matter, and as there was no imputation or suggestion of any corrupt motive influencing the judge, which is upon applications of this kind, he should refuse the



## COURT OF COMMON PLEAS.

*November 19, 1852.*

## HORRIDGE v. WILLOUGHBY AND OTHERS.

*Appeal from a County Court—Ferry—Liability of ferryman.*

*lessee of a ferry receives on board of his ferry-boat a mare of B., who keeps charge of her on board. Slips for landing are provided by the owner of the ferry; one of these has a damaged handrail, known to the ferryman, which injures the mare:*

*It is held, that the ferryman was bound to provide the means of landing, and having negligently provided a slip with a broken handrail, by reason of which the mare was injured, he was liable for the loss:*

*It is also held, that where an objection is raised on the argument of the appeal, but was not urged at the trial, the court will not send the case back to the judge to be amended, so as to give the means of deciding upon such objection.*

THIS was an appeal from the decision of the judge of the County Court of Birkenhead. The case stated that the defendants were lessees of a steam-boat ferry for the carriage of passengers and goods between Birkenhead and Liverpool, and that it was part of their duty to find accommodation for embarking and landing; that it was not their custom to take charge of live stock on board their boat; that the plaintiff brought a mare on board of the ferry-boat, and himself kept charge of her; that the defendants did not by themselves or their servants interfere with her; that the landing-pier being some feet higher than the boat, steps with handles were used for landing passengers, and also for stock; that on the day in question the handrail of the slip used for landing the mare—having been some days previously broken—was fastened with a piece of cord; that it was again broken that morning, and, although the defendants were cautioned by a policeman against using it, it was fastened together again and used for landing the plaintiff's mare; that the mare pressing against the damaged handrail, it was again broken, and a piece of iron of which it was formed entered into the side of the mare, and injured her so much that she was obliged to be put to death. By the verdict, the plaintiff sought to recover the sum of 31*l.* 10*s.* the value of the mare, for that the defendants as carriers were entrusted with the mare of the plaintiff to carry from Birkenhead to Liverpool, and that they, by their negligence, caused an injury

JERVIS, C. J.—No; and the substance of the su the negligence of the defendants.] The judge dre we could not interfere. But the defendants are 1 The ferry is for the conveyance of passengers and not a part of their duty to provide accommodation and landing. But even if it is, the plaintiff having mare should have looked to the sufficiency of th defendants are not liable.

*Tomlinson* for the defendants, was not called upo

JERVIS, C. J.—I am of opinion that the judge Court was correct. I do not think he is subject tions which were made upon him for not setting ou At the trial the objection now sought to be 1 defendants were not liable as carriers, was not tal tion then urged was that they were not liable, be not the personal care of the mare. It does not a particulars that the action was brought against carriers, it might have been for actual and aggressi it might mean that the defendants for hire took their negligence it was staked. If that is so, it their duty to provide everything necessary for the passengers and goods from the one side to the other six feet from the shore, they might as well stop in the Mersey—the horses cannot jump from the boat and it is their duty to provide the means of thei The slip had an iron spike disguised as a handrail; c pressure it gave way, and the spike entered into the plaintiff could have seen it, perhaps he would l another rail. I think for this injury the defendants

MAULE, J.—I am of the same opinion. As t form, if it had been raised at the trial, and the case

## COURT OF QUEEN'S BENCH.

November 27, 1852.

ADEY v. THE DEPUTY-MASTER OF THE TRINITY HOUSE.

*Prohibition—Toll.*

*s payable to the trustees of a harbour by vessels passing within certain limits are tolls, and the question whether dues are payable both on the outward and homeward voyages, is a question of title within s. 58 of 9 & 10 Vict. c. 95 (County Courts Act), and one not within the cognizance of County Courts.*

THE plaintiff was the owner of a vessel, that on her voyages out from Goole to Memel and back, had passed within the limits within which vessels passing became liable to pay dues to the trustees of Ramsgate Harbour. The trustees claimed the dues as payable on both the voyage out and home; the plaintiff paid the dues on both, but the dues, 1*l.* 4*s.* on the homeward voyage, were paid under protest; and the plaintiff now sued in Dorsetshire County Court to recover back the 1*l.* 4*s.* paid on homeward voyage.

*Willes*, having obtained a rule nisi for a prohibition, on the ground that a question of title came in issue within the meaning of the proviso in 9 & 10 Vict. c. 95, s. 28:

*Barstow* shewed cause.—The word “toll” in the proviso is not applicable to anything of this description. Besides, here the question as to who was to receive the toll, was not in dispute; it is settled that the trustees are the parties to receive it. The question only is in dispute. Where a claim was set up for dues in respect of empty waggons passing along the line by a railway company, it was held that they were not within the proviso of s. 58: (*Hunt v. Great Northern Railway*, 10 C. B. 900.) That is something like the present case.

*Stamwell* and *Willes*, contra.—As the title to take the particular dues may come in question, this would seem to be a case within the proviso. [COLERIDGE, J.—The dues payable in respect of steamships have always been considered tolls.] *Hunt v. The Great Northern Railway Company* was not the case of tolls, but of dues payable in respect of the use of locomotive power. The question of title involves two things, the existence of the toll and the right of the party claiming to receive it.

itself exists. In common parlance, it includes both.  
WIGHTMAN and ERLE, JJ. concurred.

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## COURT OF EXCHEQUER.

November 25, 1852.

CHEW v. HOLYROOD, and ANOTHER

### *Prohibition—Title to land.*

*Plaintiff being the owner of a cottage, underlet to one of the whole except (as he alleged) two rooms reserve himself. Defendant alleged that the plaintiff had let the cottage, and he accordingly, with the other defendants, took two other rooms and removed plaintiff's furniture. In an action against them in the County Court for trespass, the defendants contended the County Court judge had no jurisdiction, as the title to a corporeal hereditament came in question. The County Court judge decided he had jurisdiction, and gave judgment for the plaintiff for 25l.:*

*Held, that the County Court judge had not, in this case, jurisdiction, as the title to land was in dispute, and that a writ of prohibition lay.*

A PLAINT had been entered in the County Court by the plaintiff against the defendants to recover possession of the cottage.

, as title to land came in question, the jurisdiction of the court was taken away; but the learned judge thought and determined it to be a question of fact only; he proceeded with the case, and gave a verdict for the or 25*l.* damages. A rule nisi for a prohibition having issued,

, Q. C. (*Wheeler* with him) shewed cause.—The question is, under the circumstances, title to land here is in question, according to the 9 & 10 Vict. c. 95, s. 58, and the decisions laid upon its construction. The words of that act are,

[County] Court shall not have cognisance of any action brought, or in which the title to any corporeal or incorporeal hereditaments, or to any toll, fair, market, or franchise, shall be in question.

A mere question of occupation is not enough; it must be a question of a nature which is capable of being inherited.

B.—The plain question is, whether title to corporeal hereditaments is in question. You will not contend that it must be a question of leasehold or fee tail. Can a County Court judge dispose of a question of title depending upon a valuable lease for a long term of years? In *Lloyd v. Jones*, 6 C. B. 81, it was held that the jurisdiction of the County Court by reason of the law now in question, the claim set up must be a *bonâ fide* one, a right one that can exist in point of law; and there is no doubt in delivering the considered judgment of the court that hereditament is defined in the text books of authority to include such things, whether corporeal or incorporeal, which a person has or may have to him and his heirs by way of inheritance, and, if they be not otherwise bequeathed, come to him who is next of blood, and not to the executors or administrators as representatives. In *Fearon v. Norvall*, 5 D. & L. 439, it was held that the jurisdiction of a County Court had jurisdiction to enquire into the tenancy was determined by a legal notice to quit, and the decision on the fact was conclusive and could not be reversed. On a motion for a prohibition in *Thompson v. Ingham*, 13 L. J. 189, Q. B.; and 14 Jurist, 429, it was held that where a question is raised incidentally before the County Court on the trial of an action over which the County Court has jurisdiction under the 9 & 10 Vict. c. 95, s. 58, whether the title is in dispute between the parties, the judge has jurisdiction to inquire and decide whether title really is in dispute, but his decision is not final; and if he decides that title did not come in question, and the Superior Court is satisfied that title did come in question, a prohibition will issue against him. Should the court decide that title to land in this case did really come in question, the title to any hereditaments be held to mean title in any hereditaments, I must say I cannot see, at present, that I have a right to answer to this rule.

The rule, in support of the rule, not called upon.

*Rule absolute, with costs only of this rule.*

CHEW  
v.  
HOLYROOD  
AND ANOTHER.

1852.

Prohibition—  
Title to land.

(Before Mr. JUSTICE CROMPTON.)

*Ex parte* SHERRING.

*Prohibition.*

*Upon an application for a prohibition to restrain a Court from proceeding with a plaint, on the ground of title to land, this court refused the rule, it appearing of the kind was taken in the court below.*

HAWKINS moved for a rule calling upon the Surrey County Court, holden at Farnham, why a writ of prohibition should not issue to restrain further proceeding in a certain plaint, in which S was the plaintiff, and the present applicant the defendant. In the affidavit used for this motion it appeared that the action brought to recover the sum of 5*l.* for the use of certain premises; and that on the trial the plaintiff obtained judgment. It further appeared that the question involved a title to land; but no objection on that point was then raised before the judge of the County Court.

His LORDSHIP thought upon this, that the rule was refused, it being quite immaterial, as far as the present case was concerned, what was the real state of the facts, in reference to them was made before the County Court, and that the judgments of these courts were not to be set aside on account of good and sufficient cause, and it could never be a party to make one case before the judge below, and to come to this court on an entirely new state of facts to obtain a prohibition. He also thought, that if

## COURT OF QUEEN'S BENCH.

*December 1, 1852.*

PAULING v. PONTIFEX AND OTHERS.

*Usage of trade.*

*plaintiff, a builder, sent in a tender ; on application of defendant's surveyor to him among others, the tenders were all opened, and the plaintiff's turned out to be the lowest :*

*, that the judge was right, on evidence before him, in concluding it, according to the custom in the trade, and the conduct of the parties, the plaintiff's, being the lowest tender, had been accepted, though N. had no absolute authority to accept the lowest.*

HIS was an appeal from the County Court at Bow. The plaintiff was a builder, and the defendants were white-lead manufacturers at Millwall. The particulars of demand annexed to the summons consisted of items amounting to 64*l.* as due to the plaintiff from the defendants for work, materials, &c., but the sum claimed was limited to 45*l.* The judge, after disallowing certain items, ordered the judgment to be entered for 20*l.* It appeared that a person named Northcroft, acting as the surveyor and agent for the defendants, had forwarded to certain builders, and among them to the plaintiff, plans of certain buildings to be erected at the defendants' premises, the tenders to be sent in to him at a certain day. That the plaintiff sent in his tender, which on the day mentioned was opened in presence of the other parties who were present in tenders, when Northcroft, and the other builders present had sent in plans, conceived, according to the custom of the trade, in such matters, that his tender, being the lowest, was accepted ; and, acting on that assumption, the unfortunate parties took of the customary refreshment at the plaintiff's expense, as the unfortunate party whose tender they conceived to be accepted.

The defendants denied that they had ever accepted the plaintiff's tender, or that Northcroft, on their behalf, had any absolute authority to accept the lowest tender ; they also denied the existence of the custom or usage above referred to.

The court found as a fact that the conduct of the defendants amounted to an acceptance. The questions for the court were—

1st. Did the court below decide rightly upon the facts and the law as to the defendants' acceptance of the lowest tender ? 2ndly. Were the particulars sufficient to answer the objections which

be most unreasonable, for it might be that the plaintiff, although the lowest sent in, was double the amount of work could have been done. As to the second point, the plaintiff should have sued as upon a contract, and the court could have been that the defendants refused to allow the plaintiff to do certain work.

*J. Brown*, contra, was directed by the court to the first point only.

COLERIDGE, J.—We are both of opinion that the verdict ought to be affirmed, subject to the reduction of the damages. The question is, whether there was any evidence to warrant the judge as to the acceptance by the defendant of the plaintiff's tender. There was the evidence of the plaintiff, with other direct evidence of usage in the trade, that it must have gone to a jury. It must be taken that the plaintiff was duly appointed, and that he was chosen as a competent person. It does not appear that any objection was made to the tender, and in addition there was the opinion of the judge in the trade then present, that there had been an acceptance of the plaintiff's tender. There was direct evidence of the plaintiff's tender, that it was the practice or custom to accept a tender, although there was certainly evidence to the contrary. The only matter we have to consider is, whether there was any evidence to go to the jury as evidence of the acceptance of the tender. There was the request to the plaintiff to send in a list of appointments of the parties tendering to meet for the purpose of having their tenders opened, the understanding being that the tenders should be opened at the plaintiff's place; and there was also direct evidence of usage in the trade, and if so, the judgment must be affirmed.

ERLE, J.—No doubt there were no words or conduct constituting any distinct contract, but parties



## COURT OF QUEEN'S BENCH.

*December 1, 1852.*

WILDES, Appellant; MORRIS, Respondent.

*of the peace—Clerk of Second Court at Sessions—Roll of fines—  
Sheriff—59 Geo. 3, c. 28 ; 3 Geo. 4, c. 46.**sheriff is not bound, as a mere ministerial officer, to levy all fines  
that may appear to be unpaid on the roll returned by the clerk of the  
peace, under the 3 Geo. 4, c. 46, and he ought not to levy where he  
himself received the fines.**clerk of the peace receiving fines in court will be liable (if he neglect  
to enter such fines as paid on the roll made out by him and delivered  
to the sheriff), to the party paying such fines, if he receive damage  
from such neglect.**whether the clerk of the peace will be liable where the fines are  
received in the Second Court by the person appointed to record the  
proceedings of the Second Court of Sessions, under the 59 Geo. 3,  
c. 28.**whether, that his liability will depend on the fact whether such appointee  
is the assistant of the clerk of the peace or an original officer.*THIS was an appeal from the County Court of Kent, holden  
at Maidstone.The respondent recovered 10*l.* damages from the appellant (the  
deputy clerk of the peace of Kent), under the following circum-  
stances.The plaintiff was tried and convicted upon two several indict-  
ments for misdemeanor at the Quarter Sessions for the county of  
Kent, in a second court holden under the statutes 59 Geo. 3, c. 28,  
3 Geo. 4, c. 46, ss. 2, 3; and 5 & 6 Vict. c. 38, s. 4. The  
plaintiff was thereupon sentenced to pay a fine to the Queen of 4*l.*Upon the first indictment, and another fine of 2*l.* upon the second  
indictment. The fines were immediately paid by the plaintiff's  
deputy to the person appointed by the clerk of the peace under  
aid statutes, to act as his deputy in recording the proceedings  
in the second court, and he, within five minutes after receiving the  
fines, handed them over, in court, to the under-sheriff.No entry was made of the receipt and payment over of the fine,  
and no written statement of the causes in respect of which the  
fines were handed over to the under-sheriff appears to have  
been given to him. Within twenty-one days afterwards, the  
clerk of the peace, in obedience to the 3 Geo. 4, c. 46, s. 2, sent a  
copy containing a copy "of all forfeited recognizances, fines, issues,  
amerciaments, and sums of money paid in satisfaction of them,

The plaintiff alleged that the appellant so neglected the proceedings that he neglected to make an entry of the fines; that when the record was made of the plaintiff was entered in the roll as liable, as of those who had paid; that the defendant sent to the sheriff, who arrested and imprisoned the plaintiff, alleged that his arrest arose from the negligence of the assistant or servant.

At the close of the case it was contended for the plaintiff that no cause of action existed against him.

1st. Because the said appointee was not in law liable to the appellant, and that the appellant was not liable for the omissions.

2ndly. That he could not be liable, as the law was not authorised to receive the fines.

3rdly. That it was not the appellant's duty to receive the money which had not come to his hands, but which was paid over to the under-sheriff.

The learned judge held,

1st. That the appellant was responsible for the omissions so appointed as aforesaid.

2ndly. That if the deputy had no authority to receive the fines, still, as he had in fact received them, it was his duty that he ought not to have received them.

3rdly. That the roll having been made up by the sheriff and sent to him by the sheriff, with the writ and in the particular form, it was for the jury to find that the appellant had not been guilty of a breach of duty, because the sheriff was a ministerial officer, and bound to execute the writs sent with the roll.

Within twenty-one days, send a copy of such roll, with a writ of *bringas* and *capias*, or *fieri facias* and *capias*, to the sheriff of the county, &c. which shall be the authority to such sheriff for proceeding to the immediate levying and recovering of such fines, issues, &c. on the goods and chattels of such several persons, or for taking into custody the bodies of such persons, in case sufficient goods and chattels shall not be found whereon distress can be made for the recovery thereof.

By sect. 3, the clerk of the peace, before he shall deliver such roll to the sheriff, shall make oath, which oath shall be indorsed on the back of the writ, or of the said roll attached thereto, such clerk of the peace stating therein all such fines, issues, &c. which shall have been paid, or otherwise accounted for, and such oath shall be in the form following:—

"I, A. B. clerk of the peace for the county of B. make oath that the roll is truly and carefully made up and examined, and that all fines, issues, amerciaments, recognizances, and forfeitures which have been set, lost, imposed, or forfeited, and in right and due course of law ought to be levied and paid, are, to the best of my knowledge and understanding, inserted in the said roll, and that in the said roll are also contained and expressed all such fines as have been paid to or received by me, either in court or otherwise, without any wilful or fraudulent discharge, omission, misnomer, or defect whatever.—So help me God."

The form of the writ to the sheriff required by sect. 2, and given in the schedule to the act, requires the sheriff "of all the debts, &c. of all and singular the persons in the several extracts of the writ annexed, to cause to be levied all and singular the debts and sums of money in the same extracts severally imposed and charged, so that the money may be ready for payment at the next General Quarter Sessions of the Peace, to be paid over in such manner as any two or more of the Lords Commissioners of her Majesty's Treasury may direct; and if any of the said several debts cannot be levied by reason of no goods or chattels being to be found belonging to the parties, then in all cases to take the bodies of the parties refusing to pay the aforesaid debts, and lodge them in the gaol, there to await the decision of the justices, &c. unless the parties shall have given sufficient security," &c.

By the 59 Geo. 3, c. 28 (An Act to empower Magistrates to hold the Court of Quarter Sessions), sect. 1, Courts of Quarter Sessions or General Sessions of the Peace may appoint two or more justices to form a court to sit apart from them.

By sect. 3, the clerk of the peace or his deputy is to appoint a proper and sufficient person to record the proceedings so had before the justices sitting apart; such proceedings to be delivered over to the clerk of the peace, and be deemed to be a part of the records of the next session, as if the same had been recorded by the clerk of the peace himself; and the justices at the quarter session are to make an order upon the county treasurer to pay to the clerk of the peace

WILDES,  
Appellant;  
MORRIS,  
Respondent.

1852.

Clerk of peace  
—Second court  
at sessions—  
Roll of fines—  
Sheriff.

ground of complaint against the clerk of the peace  
ing a fit and proper person ; but it is sought to mak  
peace liable here for omitting to enter fines as pai  
self did not receive them. Nor is there the same  
between the sheriff and his under-sheriffs or bailiff  
constitute but one person : (*Cook v. Palmer*, 6  
*Crowder v. Long*, 8 B. & C. 598 ; *Cameron v.*  
403.) Then by the statute the appointee is to rec  
ings of the second court. The receipt of the fine  
the roll of fines, is no part of such duty. The fi  
in to the appointee, who within five minutes han  
the sheriff, so that it is as if the fines had been p  
in the first instance. The clerk of the peace  
ledge of the payment when he made out the  
besides the sheriff is the proper officer to receive  
doubtful whether the clerk of the peace can rece  
(*Dalton's Country Justice*, tit. "Sessions," c. 185  
"Sheriff.") The clerk of the peace only dispose  
his knowledge and belief as to the fines that oug  
and he is to insert upon the roll the fines imposed  
as well as at the quarter sessions. And in makin  
proper course was to omit what the sheriff had r  
he would know of such moneys that they were ir  
the writ satisfied. So also of all sums which wi  
days the sheriff might receive of his officer. The  
c. 46, s. 10, imposes a penalty of 50*l.* for non-per  
duties required by the act, and that would seem t  
that ought to have been pursued in this instance.  
—That does not take away the plaintiff's comm  
damages for the false imprisonment.] Lastly, it  
direction to tell the jury that the sheriff was a

tiff as set out in the roll, but only that two sums of money  
handed to him. [ERLE, J.—The judge, by his direction,  
the receipt by the sheriff wholly immaterial, as he told the  
that the sheriff was a mere ministerial officer, and bound to  
the fines according to the writ sent with the roll.]

OLERIDGE, J.—In this case there must be a new trial, on the  
nd of misdirection, for when the judge told the jury that the  
iff was a purely ministerial officer, and could exercise no dis-  
ion in the matter, he made many circumstances that were  
erial, immaterial, and misled them. Looking at the statute  
eo. 4, c. 46, I think we ought not to give a strict and unrea-  
able construction to the language of the oath in the third  
ion. The clerk of the peace is to make a return of the fines which  
e been imposed at the quarter sessions, and also those certified  
the justices to have been imposed out of sessions, some of which  
statute contemplates he may have received; and at a period  
exceeding twenty-one days from the quarter sessions, he is to  
e out a roll containing an account both of the fines certified by  
justices, and also of those paid or to be paid in lieu or satisfac-  
ion. He is to send a copy of this roll, with a writ annexed, for  
ring the fines, to the sheriff, and accompanying this is the oath  
rsed. The oath is positive as to all fines that have been paid  
he clerk of the peace, but it is only conjectural and conditional  
to those which may have been paid to the sheriffs; for the  
ds, "all fines which, in right and due course of law, ought to  
levied and paid, are, to the best of my knowledge and under-  
standing, inserted in the roll," are conjectural only; but the words  
nd that in the said roll are contained and expressed all such  
s as have been paid to or received by me," are absolute; and  
er this latter head I think the clerk of the peace has made  
ult in not having entered these fines as paid. Some of the  
s in the roll may have been paid to the sheriff between the  
es of their imposition and the delivery of the roll to him. The  
k of the peace, therefore, can only say, as far as he knows, that  
roll is correct as to the unpaid fines. On the receipt of this roll  
sheriff's duty is not merely ministerial; he is not to act on the  
s of it, as that would be a very great injustice, and the words  
the statute cannot be considered to go to that length; there-  
at, therefore, be a new trial. But we may as well state now  
at is our opinion as to the duty of the clerk of the peace. Sup-  
ing him to have received the fine, and to have omitted to enter  
s paid on the roll, and that then the sheriff, not knowing of the  
ment, levies, although a sheriff himself may not be quite free  
a negligence, particularly when, as in this case, it may be handed  
r, yet I think there would be a breach of duty if the fine were  
l to the clerk himself. But in this case the fine was paid to the  
intee, and by him handed over to the sheriff; and whether  
breach of duty by him constitutes negligence on the part of  
clerk of the peace, depends upon the relation between the  
k and his appointee, and we have not quite sufficient facts

WILDER,  
Appellant;  
MORRIS,  
Respondent.

1852.

*Clerk of peace*  
—*Second court*  
*at sessions—*  
*Roll of fines*  
—*Sheriff.*

brought to an end. The roll ought to be made up of the peace, including all fines either paid or to be paid, not clear that it is his duty to enter on the roll what he thinks may have been paid to the sheriff; and it is not his duty to ascertain, at his peril, the entries on the roll. The sheriff received this writ to have the money ready for the Commissioners on a certain day, and if he has obtained the money he has nothing more to do than to pay it over at the time to the commissioners. I think that, under the Statute, if the clerk of the peace is authorised to receive fines in court, and damages ensue, he is liable; but here he is only a deputy, and the question, therefore, is, is such an officer, having original authority? As far as it goes it would look as if he were an original officer. Justices at quarter sessions are to make an order for the clerk of the peace to pay to the clerk of the peace reasons for such officer. If the clerk of the peace were an articled clerk to record the proceedings of the court, it would be a strong circumstance to show that he is an assistant, for whom the clerk of the peace was responsible. Facts, however, were not examined at the trial on this point, and it seems to me, therefore, that the result will depend on the point whether the appointee was acting as an original officer, or merely as the clerk of the peace.

*New trial ordered.*

## COURT OF EXCHEQUER.

January 17, 1853.

SHAW v. BECK AND ANOTHER, Executors, &amp;c.

*Practice—Evidence in reply—Discretion of judge.*

On an interpleader summons the plaintiff put in and proved an assignment by way of mortgage to him of the goods in question seized by the bailiff. The defendant then proved the deed fraudulent as against creditors; the County Court judge held it fraudulent, and declined to hear the plaintiff's evidence tendered in reply to negative the fraud:

and, upon an appeal to this court, that the County Court judge was wrong in rejecting the evidence tendered by the plaintiff in reply to negative the fraud. A new trial was directed.

THIS was an appeal from the County Court of Halifax, arising upon an interpleader summons obtained by the officer of the court, who had levied an execution upon certain goods to which a lien had been set up by the plaintiff Shaw, who alleged that the goods in question had been assigned to him by way of mortgage securing 50*l.* 15*s.* which had become absolute by reason of payment on the 9th April, 1852. A power of sale was contained in the mortgage given by Mellor, the mortgagor, to Shaw, and a schedule of the goods annexed. The execution of the deed being proved, the defendant then gave evidence that it was fraudulent, whereupon the plaintiff wished to offer evidence of the circumstances under which it was given, so as to negative fraud; but the County Court judge rejected it, and held the deed to be fraudulent; the defendant contending that the plaintiff should have given such evidence, if at all, in the first instance, when he offered proof of the deed, &c. The question for the opinion of the court, therefore, was, whether under the circumstances the plaintiff should have done so when he first proved a *prima facie* case, or whether he could not give evidence to negative fraud in reply to the defendant's case—whether the County Court judge was right or wrong in rejecting the plaintiff's evidence, which was tendered in reply to the case made by the defendant.

*Hugh Hill*, Q. C. for the plaintiff.—It does not appear from the evidence how the executors were suing; if in tort, there would be no objection until judgment, and they could not be creditors so as to be enabled to dispute the validity of the deed, which would be good and binding at all events between themselves or third parties not

first instance what the defendant is going to prove.—The rule appears to be laid down by Lord Tenterden in *Murray*, Ry. & M. 254.] This is the most correct and is in accordance with the general practice.

*Atherton*, Q. C.—The only point to be determined is the second question raised in the case, whether the plaintiff is bound in the outset of his case to prove it or whether he may have known that fraud was intended to be proved and not to lie by to see if fraud was proved and tender evidence to negative it. [MARTIN, B.—The course to be pursued as in an action upon a bill of exchange, with a plea of fraud?] The judge is at the discretion at all times as to how the case shall be tried, whether evidence should be given at one place or another; and that appears to be the decision in the Common Pleas in *Wright v. Wilcox* (19 L. J. 100). The practice at Nisi Prius, on evidence in reply to an action of trespass for false imprisonment. The defendant pleaded, first, on the ground that the plaintiff had stolen goods belonging to the defendant; and, secondly, on the ground that the defendant had reasonable cause for suspecting the plaintiff of stealing his "chaff." The plaintiff gave some evidence of his honest possession of some chaff, and some peculiarities were spoken to similar to those in the chaff found in the defendant's drawer, and claimed by the defendant as his stolen goods. Mention was made of linseed either in the plaintiff's case or in the course of the plaintiff's case by cross-examination. The defendant called witnesses, who proved that it was not his, and also in that found in the plaintiff's drawer was found mixed. The plaintiff then proposed and was allowed by the judge to call her father, who was in court, to prove



arts it may be always as well perhaps that they should hear as much as they can. But suppose in a case of felony the name of the parish had been omitted to be proved by the prosecutor, and the evidence given on behalf of the prisoner to negative the supposed place, can any one doubt that the judge would immediately call the witness or witnesses called to prove the correct parish? The question is, whether the County Court judge has a discretion to exercise, and if so, whether he wisely exercised that discretion in rejecting the evidence. In 2 Phillips on Evidence, 409 (edit. 1843), it is laid down that the question whether evidence ought to be admitted in reply is entirely for the discretion of the judge, depending at the circumstances of each case: (Taylor on Evidence, 75.)

*Will*, in reply (was stopped by the court.)

*Collock*, C. B.—We are all of opinion that there must be a new trial in this case, as the judge of the County Court should have rejected the evidence offered by the plaintiff in reply to the fraud alleged by the defendant. In ejectment the practice is common enough, although I do not at this moment recollect the cases upon the subject, that if a defendant proves some title to defeat the plaintiff's *primâ facie* case, the plaintiff may prove something else to defeat that case the defendant has set up, and so go on: (the learned Chief Baron afterwards mentioned *Doe dem. Sturt v. Mobbs*, 8 Marsh. 1; *Rowe v. Brenton*, 8 B. & C. 737, and other cases in reference to it.) This case differed altogether from *Middleton v. Arnard* (18 L. J. 433, Ex.), where the case had been closed; also from *Jacobs v. Tarleton* (11 Q. B. 421), where the evidence offered in reply was held properly rejected, because it was not in contradiction of the defendant's case, but merely contradictory of the plaintiff's *primâ facie* case. In *Wright v. Wilcox*, in the Common Pleas, the evidence was received, not rejected. Where an action is brought by the heir-at-law claiming as such, and the defendant proves a devise, then the heir-at-law would be at liberty to rebut the devise. In this case a deed is put in showing title, *primâ facie*, to the goods claimed; the defendant answers by saying it was fraudulent as against creditors; the plaintiff desired to give evidence to negative the supposed fraud, and I must say I think he was at liberty to do so: the evidence should have been received, and the plaintiff had a right to say, I shall not be the first instance offer this evidence, until I see what is proved by the defendant in answer. It is better, therefore, to adhere to the general current of authority that it is only incumbent on him to prove, in the first instance, just as much as is necessary to establish his *primâ facie* case. In ejectment a *primâ facie* case is made, then a *primâ facie* answer, which may be again rebutted, so they go on: the judge here, therefore, should have received the evidence, and there must be a new trial.

*ARKE*, B.—I am of the same opinion; yet, after the case of *Wright v. Wilcox* in the Common Pleas, I will not say it is not in the judge's discretion; but the judge ought to have exercised that

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ANOTHER.

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and should be accepted in the County Court. On no pleadings, as all is there by parol; the bailiff took goods for the execution creditor, the plaintiff in virtue of this deed which he gives in evidence. Imputed to the plaintiff by the defendant, it is incumbent on him to prove it; and when he has done so, it is then incumbent on the plaintiff to give evidence to negative that alleged consideration was necessary to support the deed, and that it was *prima facie* good. It was incumbent on the defendant then to prove fraud, which he appears to have done to his satisfaction, and I am far from saying he was wrong as it went; but it certainly was open then to the plaintiff to tender evidence to disprove the fraud. I refused the evidence offered, in which I think I was right. There must be a new trial.

ALDERSON and MARTIN, BB. concurred.

## COURT OF COMMON PLEAS.

*April 22, 1852.*

HAYES v. KEENE.

*Detention of, after expiration of warrant of commitment—  
Demurrer—Construction of Rule 131.*

giving judgment against him in a County Court, and an order  
him to pay the debt and costs by instalments, made default,  
in a judgment-summons was issued, and on his non-appear-  
-eto, a warrant of commitment was issued against him under  
rule of the "Practice and Proceedings of the County Courts,"  
which directs that "such warrant shall bear date on the day on which  
of commitment was made, and shall continue in force for  
three calendar months and no longer." The warrant authorised the  
to take the debtor, and his commitment in prison "for the term of  
three months from the date of the arrest." The warrant bore date on the  
16th of September, 1851, and on the 16th of December following the  
debtor was arrested and delivered into the custody of the keeper of the  
gaol, whom it was directed, who detained the debtor until the 25th  
of the same month, being seven days beyond the three months during  
which the warrant was to be of full force and effect.

The plaintiff brought his action of trespass against the gaoler for assault  
and imprisonment, and the latter pleaded a justification under the

To this plea the plaintiff replied that the warrant, by the  
rule of the "Practice and Proceedings of the County Courts,"  
was to continue in force three calendar months, and no longer, and  
though he was arrested within that period, and was imprisoned  
for more than four thereof ten days, yet he was unlawfully detained in  
the gaol seven days beyond the three calendar months during which the  
warrant had to run :

The general demurrer, that there replication was no answer to the  
plea, that, although the warrant was to remain in force only  
three months from the date of the order of commitment, the debtor,  
when arrested within that period, was to be imprisoned for  
the term of days specified in the warrant, notwithstanding the three  
months during which it had force were expired before the debtor had  
served the term of imprisonment which the County Court judge had

ASS for assault and false imprisonment. The declara-  
-tion stated that on the 16th of December, 1851, the defendant  
arrested the plaintiff, and seized and laid hold of the plaintiff and  
detained him in a certain gaol or prison for ten days then next

Plumley, then being the clerk of the said court, d  
the seal of the said court, a warrant of commitm  
“ In the County Court of Surrey, holden at Wand  
Alfred Rosling, plaintiff, and William Hayes,  
directed to the high bailiff and others the bailiffs c  
and to the Governor or Keeper of the Common  
monger-lane; by which said warrant, after reciting  
holden at Wandsworth on the 2nd of May, 1850,  
Rosling, by the judgment of the said court in  
wherein the said court had jurisdiction, recovered  
plaintiff the sum of 6*l.* 17*s.* 1*d.* for his the said  
debt, and the sum of 2*l.* 3*s.* 1*d.* the costs of the sa  
ing together to 9*l.* 0*s.* 2*d.*, and that, therefore, i  
there ordered that the now plaintiff should pay to  
said court in Wandsworth, by instalments, t  
every four weeks; and reciting that the now plai  
paid the said sum pursuant to the said order, a  
upon application of the said Alfred Rosling, duly  
out of the said court against the now plaintiff, by  
he was required to appear at the said County C  
Wandsworth on the 6th of March, 1851, to answe  
as might be put to him touching his estate and  
manner and circumstances under which he cont  
debt, and as to the means and expectations he the  
the property and means he still had of dischargi  
and as to the disposal he had made of any propert  
that it was duly proved on oath at the said menti  
the now plaintiff was personally served with the  
and reciting that the now plaintiff did not attend  
such summons, or allege any sufficient excuse for n  
and thereupon it was ordered by the judge of the

at under the said warrant, or until he should sooner be discharged by due course of law, for which that warrant should be a sufficient warrant to the said high bailiff, bailiffs, and others, and to governor and keeper of the said common gaol, which said warrant bears date, to wit, 19th September, 1851, and was duly signed and sealed; which said warrant afterwards, whilst the same was in force,

before committing of the said trespasses, &c. to wit, &c. was served by the said clerk to one William Goff, then being one of bailiffs of the said court, to be executed in due form of law, by virtue of which said warrant afterwards, and before three calendar months from date thereof, &c. and before committing, &c. and the said warrant was in force, to wit, on 16th December, 1851, said William Goff, &c. did then, within the jurisdiction of the said court, take and arrest the now plaintiff by his body, and did forthwith convey him to the said common gaol at Horseger-lane, and did then, under and by virtue of the said warrant, deliver the now plaintiff to the defendant, who then was, and is, governor and keeper of the said gaol, and the defendant then receive the now plaintiff into the said gaol into his custody, as such governor and keeper; and the defendant further, that he being such governor and keeper of the said common gaol, under and by virtue of the said warrant, safely kept and detained the now plaintiff in prison in the said common gaol from the time when he received the now plaintiff into the said common gaol as aforesaid, until he, the now plaintiff, was discharged from prison by due course of law, to wit, for the said time in the execution mentioned, as the defendant lawfully might for the reasons aforesaid, which are the said several trespasses in the execution mentioned, &c.

*Application.*—That after the passing of the County Courts Amendment Act (12 & 13 Vict. c. 101), and before the issuing of a warrant in the said plea mentioned, to wit, on 2nd February, 1852, Charles Lord Cottenham then being Lord Chancellor, duly authorised and appointed five judges of the County Courts to make such general rules and orders as to them should seem expedient for and concerning the practice and proceedings of the County Courts, and for the execution of the process of such courts, &c. each said judge afterwards, and before the issuing of the said warrant under and in pursuance of the said appointment and authority, framed divers general rules and orders; and, amongst others, the following general rule and order (rule 131), that is to say:—“Warrants of commitment whenever issued shall bear date the day on which the order for commitment was made, and shall continue in force for three calendar months, and no longer, no order for commitment shall be drawn up or served,” which said rule or order was afterwards duly certified to Thomas Lord Lyndhurst, then being Lord Chancellor, under the hands of the said five judges, and was then submitted by the Lord Chancellor to some of the judges of the Superior Courts of Common Law, which said three judges then approved of the said rule, and the

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KENNE.

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*Prisoner,  
detention of—  
Rule 131.*

to wit, from and after the 19th day of December the 25th day of December, in the year last afore imprisonment and trespass in the declaration men

To this replication the defendant demurred ge said replication is not sufficient in law," &c.

Joinder in demurrer.

At the foot of the warrant set out above in tl this notice:—"N.B. This warrant remains in calendar months from the date thereof."

*Channell*, Serjt. and *D. T. Evans*, in support of t tended that as the plaintiff was arrested and recei into goal under the warrant within three calendar date of the warrant, the defendant was thereby jus the prison, acting under the warrant, in keepin prison for the space of ten days, being the term mentioned in the warrant, notwithstanding three from the date of the warrant, as limited by rule and Orders concerning the Practice and Proceedi Courts, had expired before the term of the pl ment mentioned in the warrant—that is to sa days' imprisonment had expired.

JERVIS, C.J.—There was a case in which a sin raised; I mean *Re O'Neill*, 20 L. J. 69, C. P.; 1

CRESSWELL, J.—What plaintiff has to contend like saying that after the expiration of a writ cause is at an end.

*Giffard*, in support of the replication.—It i judgment on this demurrer should go for the pl set out in the replication is both clear and expl that the warrant of commitment shall be of for three calendar months, from the date of the orde

a warrant of commitment, which also is the warrant of arrest. [CRESSWELL, J.—With your view of the point the man, having been taken only three days before the expiration of the warrant, cannot be imprisoned for the period directed by the judge, except on a fresh warrant.] The defendant might have gone to the judge and obtained the 135th rule for another warrant. [CRESSWELL, J.—How could you have a second warrant of commitment, the first having expired?] If the judge pleases he can grant successive warrants. JERVIS, C.J.—Yes; but that is for a fresh offence: a manifest necessity follows this argument. The man is held by reason of the judgment, and the purpose of the warrant is to apprise the gaoler of the judgment and subsequent proceedings, and to authorize the gaoler to hold.] The only manner in which the gaoler can detain the prisoner is by the warrant, which expired before the release of the prisoner. As far as the gaoler is concerned, this is a warrant of commitment,—and that only; he has nothing to do with the capture of the plaintiff; he has only to receive him and detain him during the period in which the warrant of commitment has force. There is no other order or warrant, which, therefore, serves for commitment and detainer. [TALFOURD, J.—There is the judgment of the County Court.] Yes. [JERVIS, C.J.—A summons issues, judgment follows, and then the warrant. The judge says, "Commit the debtor for ten days," which is the authority for the warrant, and the clerk, acting under the 9 & 10 Vict. c. 95, s. 111, issues a minute of the order, and the warrant issues. WILLIAMS, J.—Do you say this is the only authority for detention?] Yes. There is no other, unless the minute of the order of the judge made by the clerk in the court book can be said to be such. [JERVIS, C.J.—What is the authority for commitment under the statute?] The authority is given in the 102nd section of 9 & 10 Vict. c. 95. [JERVIS, C.J.—As I understand that clause, it means that the gaoler shall receive and to receive and keep the defendant until the period for which he was committed expires by effluxion of time or by habeas corpus. There is here good ground of justification.] This case is different from one under a *capias*, because there are words inserted in this warrant—that it shall not be of force and effect after three months—which a *capias* does not contain. JERVIS, C.J.—I should be very sorry if the court felt constrained by any technical construction to give judgment for the demurrer on this demurrer, because, in fact, by so doing, the court would be impeding the operation of the County Courts Act, and such a decision would necessarily have the effect of obstructing the execution of all warrants where a defendant kept out of the court until the term of the warrant was nearly expired. Either the warrant could not be taken at all, or, if taken, must be discharged without having undergone the term of imprisonment awarded by the County Court judge. I am happy, however, to say, that, in the opinion of the court, it is not necessary to adopt that construction. Construing the rule in the strictest way,—namely, that the warrant of commitment should bear date from the day that the order of

HAYES  
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judgment recited in it should not be fully carried  
defendant, therefore, is entitled to the judgment  
this demurrer.

CRESSWELL, J., concurred.

WILLIAMS, J.—I am of the same opinion. I  
meaning of the 131st rule is, that when once the  
into operation, it is to operate as to the terms con-

TALFOURD, J., assented.

*Judgment for*



## COURT OF COMMON PLEAS.

*February 24, 1853.*

JUSTICE. v. GOSLING AND OTHERS.

*assault and false imprisonment—Arrest by police constable—Conviction for furious driving—2 & 3 Vict. c. 47, ss. 54 and 63.*

*A plaintiff having been arrested and imprisoned by the defendants, who were police constables, on a charge of furious driving, brought an action of tort against them in the County Court. At the trial the plaintiff, in opening his case, stated that the defendants had taken him into custody and detained him for some time in a station-house on a false and unfounded charge of furious driving, and that on their evidence he had been convicted of the offence by two justices of the peace and fined 20s. For the defendants it was thereupon objected that, by that admission, the plaintiff had put himself out of court. A copy of the conviction was put in evidence; the plaintiff admitted he had paid the penalty, and had not appealed against the decision of the magistrates; and the County Court judge, considering that the conviction was a conclusive answer to the action, so directed the jury, and a verdict was accordingly found for the defendants. The judge stated the case for this appeal, but it did not show that the plaintiff committed the offence of furious driving within view of the defendants, so as to justify the arrest of plaintiff under 2 & 3 Vict. c. 47, s. 54: and, on appeal, that the direction of the County Court judge was wrong, and the judgment must be reversed.*

*THIS was an action brought in the County Court of Herts, holden at Barnet, before the deputy judge of that court, and was brought before this court by appeal from the direction of the judge at the trial of the cause.*

*The case was settled by the deputy judge, the parties themselves being unable to agree as to the statement of the same. The plaintiff brought his plaint in the above-mentioned County Court against the defendants, Gosling, Sumner, and Surman, for a tort taking him into custody and detaining him at the police station Barnet, on (as he alleged in his particulars) a false and unfounded charge of furiously driving a horse and gig to the danger of passengers in the public highway. The plaintiff claimed 25*l.* damages. The cause was tried in the County Court before a jury on the 17th of August, 1851. On the hearing, the plaintiff stated that the two defendants first named arrested him between ten and eleven o'clock at night on the charge above mentioned; that the charge was false and unfounded; that before they took him into*

prove the conviction, on which an examined copy  
conviction was proved and put in by the defendant

" Metropolitan Police District

Middlesex, to w

" Be it remembered, that on the 28th day of  
Walter Justice, of Bernard-street, within the  
police district and county of Middlesex, solicitor,  
us, James Dickens, Esq. and Charles Herbert C  
of her Majesty's justices of the peace for the sai  
dlesex and county of Hertford, sitting at the Bar  
court within the metropolitan police district, and  
Hertford, and is charged before us with havin  
April, A.D. 1851, at the parish of Finchley, in the  
county of Middlesex, in the public thoroughfare tl  
and then furiously driven a horse and gig along  
to the common danger of the passengers in st  
and it appearing to us, James Dickens, Esq. and  
Cottrell, Esq., upon the oath of William Gosling  
credible witnesses, that the said Walter Justice  
said offence, we do hereby adjudge the said V  
forfeit and pay for his said offence the penalty of  
to be applied as the statute in that case ma  
directs. Given under our hands the day and yea

" JAMES DICKENS

" CHARLES HERE

The plaintiff admitted he had paid the penalty &  
him, and had not appealed from the conviction or  
steps to impeach its validity. The case concluded  
thereupon the said deputy judge being of opinio  
circumstances hereinbefore mentioned, the said  
answer to the plaintiff's claim for damages. dire

l for the defendants. The conviction was not admissible in  
 lence, so as to put the plaintiff out of court, as was here done.  
 a conviction before magistrates was under 2 & 3 Vict. c. 77,  
 s. 54 and 63. [WILLIAMS, J.—The proceeding was similar to  
 ordinary case at *Nisi Prius*, where the judge directs a nonsuit.  
 AULE, J.—It comes to this—the plaintiff is taken into custody  
 a charge of furious driving, and convicted before a magistrate,  
 he says, on a false charge; the question, then, is “was he ever  
 victed?”] A conviction of an offence is no evidence against a  
 ty in a civil action; it is not a proceeding between the same  
 ties. It is also inadmissible, because the conviction might  
 sibly have gone upon the evidence of the defendants them-  
 es: (2 Phil. Ev. 23.) Secondly, a conviction for furious driving  
 not be evidence where the question is not whether plaintiff  
 furiously driving, but a question of false imprisonment. The  
 viction, therefore, as regards this case, was wholly irrelevant,  
 rldly, if the conviction was not irrelevant, and was conclusive  
 o furious driving, it was not conclusive evidence in a question  
 lse imprisonment. Supposing the conviction exonerated the  
 ndants from punishment for arresting the plaintiff, it would  
 justify their assaulting the plaintiff, and keeping him in custody  
 a length of time. The plaintiff was not allowed to state his  
 in full, but was cut short by the judge directing a verdict for  
 ndants. There is nothing in the statute to justify this arrest.  
 s 2 & 3 Vict. c. 47, authorises police constables to arrest indi-  
 als in certain cases, but it does not protect them in an arbitrary  
 eeding such as this. By sect. 54 police constables are autho-  
 id to arrest persons who, *in their view*, are guilty of furious  
 ring in a public thoroughfare; but that power is limited by  
 t. 63, which enables a constable to take into custody any person  
 mmitting offences within his view, provided that person does  
 : give the constable his true *name* and *residence*. In this case  
 plaintiff gave the police constable his card containing both.  
 LAULE, J.—I observe sect. 54 applies to particular offences  
 rein specified. If a person commits either of these within view  
 the constable, whether he gives his name or not, the constable  
 y take him into custody.] It was on the defendants to show  
 t they had good cause for imprisoning the plaintiff, and that the  
 ence was committed within their view.

*Ellis*, interposing.—The case does not anywhere show that the  
 ence was committed within the view of the constables. You,  
 refore, cannot enter on that objection. It was not taken in  
 a court below, and cannot now be entered into on appeal.

*Raymond*.—I reply to that by reference to a case of *Simmons v.*  
*Ellingen*, 2 C. B. 524. The part of the marginal note most  
 aterial is this:—“In trespass by A. against B. for false im-  
 prisonment, B. justified, on the ground of A. having wilfully and  
 without excuse, within view of the constable who apprehended  
 A, annoyed and disturbed the plaintiff and his family by knock-  
 ing and ringing at his door. Held, that to support this plea under

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 v.  
 GOSLING  
 AND OTHERS.  
 —  
 1852.

*Trespass and  
 false imprison-  
 ment—Arrest  
 by constable—  
 Conviction.*

opening.]

*Ellis*, for the respondents, was then called on. The plaintiff is analogous to a declaration in case of arrest and taking into custody on a false charge. proof lay on the plaintiff. [MAULE, J.—The proof of trespass for assault and false imprisonment of a man and convey him to a police office, that you must justify it.] I rely on sects. 54 and 63 of the latter clause not only empowers a constable to arrest persons who commit offences within view, but also of having committed or being about to commit a breach of the peace. In the present case the defendants had no evidence believing that the plaintiff had committed a breach of the peace. [MAULE, J.—They did not say so; or at all even by the statement of the case.] As the case is in the court will allow it to be re-stated.

MAULE, J.—We cannot order that. The decision below must be reversed with costs. There will be costs of appeal to the appellant.

*Judgment reversed. New trial ordered.*

## COURT OF QUEEN'S BENCH.

*December 1, 1853.*

## COUNTY COURT APPEAL.

(Before COLERIDGE and ERLE, JJ.)

DUKE AND OTHERS v. THE MIDLAND RAILWAY COMPANY.

*Trover—Evidence of conversion.*

*plaintiffs bought timber at Hull, which was by their direction forwarded to the York and North Midland Railway Company at Hull, be forwarded to the plaintiffs at Nottingham. The timber was ried over the Ambergate Railway Company to the Nottingham tion, which belonged to the Midland Railway Company, and came to the possession of the Midland Company. The plaintiffs made a written demand of the timber on the Midland Company, with an offer to pay any expenses to which it was liable, but this was refused, and they were told that they could only have it by taking it back to the first station on the Ambergate line, five miles from Nottingham. Evidence of a conversion by the Midland Railway Company.*

THIS was an appeal from the decision of the judge of the County Court at Nottingham.

*Trover for timber.*

The plaintiffs, who resided at Nottingham, purchased timber at Hull, and ordered it to be forwarded to them by the York and North Midland Railway Company. The timber was proved to be in the defendants' possession at their station at Nottingham; and the mode by which it came there was proved by the following evidence from the goods-manager of the Midland Railway Company, the secretary of the Ambergate, Nottingham, and Boston and Eastern Junction Railway Company:—

“Midland Railway, Nottingham.

Sir,—I have to inform you that the understated goods have arrived at this station by your line, and, not being included in the agreement under which the use of the station is to be afforded to your company in regard to the traffic of your line, this company cannot undertake the delivery thereof, and I am instructed therefore to require that the said goods shall be taken back again.

“JOHN ASHWORTH.”

A list of the goods was appended.]

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away, but by the Customs' orders it was removed to the defendants' warehouse; M'Craith stating he had Ashworth (the goods-manager above referred to) to timber go, and that they could only have it by a truck back again to the first station on the Ambergate from the Nottingham station).

Upon these facts the defendants contended at trial that there was no evidence of a conversion by them. The court rejected this contrary opinion, and gave judgment for the plaintiff.

Against this decision the defendants now appear Mellor (*Giffard* with him) for the defendant to part with the possession of the timber was qualified and reasonable one under the circumstances. The letter explains the defendants' conduct: the timber was taken from the Nottingham station by the Ambergate line, and the contract between the Ambergate line and the company, the defendants were not bound to deliver it, and refused to accept that responsibility, and told the plaintiffs they would bring the timber back again. It was the duty of the defendants, under these circumstances, to part with the timber to any others than the Ambergate company. [C] Suppose the timber had been trespassing. The plaintiffs are willing to pay any charges upon the timber if the defendants thought they were not safe in delivering it to the plaintiffs, they might have obtained an indemnity; they had no right to demand it. The timber was lying at their station. Secondly, there is no evidence of a conversion by the defendants. In all the cases of trover against corporate bodies it has been found to be evidence that the fruits of the conversion were put into the hands of the corporation. Here the timber was put into the hands of the corporation.

body to the use of the defendants themselves, when there was only a detention for the purposes of the party detaining them. Demand and refusal are certainly not conclusive evidence of a conversion, but there is nothing to show they do not in this case amount to a conversion. In consequence of some disagreement between the two railway companies, the defendants chose to detain the plaintiffs' goods. The plaintiffs demanded the goods of the defendants, and in addition served a written notice of demand on the station-master; and when they attended at the station to take their goods, the station-master refers them to M'Craith, and therefore would be in the same position as the station-master. No one could bind the company, surely the station-master could. Then M'Craith does plenty to bind the defendants.

**JUDGE, J.**—When the goods arrived at Nottingham, the plaintiffs were entitled to have the goods delivered to them; they demanded them, and they were refused. That was a conversion, unless the defendants can justify their refusal. They say the goods were brought to their station by the Ambergate Railway Company, an intermediate line, which had no right to send such goods to their station, and they therefore insist that the Ambergate railway should take them back to the part which belongs to that company. The plaintiffs clearly had a right to have their goods, though by mistake brought, or without right, on the defendants' premises, and paying the charges the defendants might have against them in respect of those goods, which the plaintiffs offered to do.

*Judgment affirmed with costs.*

ROOKE AND  
OTHERS  
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THE MIDLAND  
RAILWAY  
COMPANY.  
—  
1853.  
—  
Trove—  
Evidence.

## COURT OF QUEEN

January 12 and

WALSH v. 1

*County Court—Partial Prohibition*

*A cargo was sold to plaintiff, to be delivered at Queen's Town, Kingdom: the price to be paid on a policy of insurance. A demand of the price was made at Liverpool, and refused, but the cargo was delivered at Drogheda. Thereupon plaintiff's action for non-delivery was refused, and, in the particulars annexed, judgment was given for 43l. damages for non-delivery. Held, on motion for prohibition, that, though the action for non-delivery of the cargo was brought in the Liverpool County Court, the writ of prohibition was as to that, but that, as the plaintiff's action was brought in Liverpool for not delivering the ship, the writ would not be a general prohibition, and that the writ of prohibition could apply to the County Court of demand.*

A RULE *NISI* having been granted by the judge of the County Court at Liverpool, further proceedings in this cause, were stayed:—

In December last the defendant, John Walsh, purchased Indian corn at Queen's Town, Kingdom, by a Mr. Meakin. The defendant the same day returned the corn at the lowest price was; but the defendant refused to pay from Mr. Meakin, disposed of the corn at a higher price. Mr. Meakin had sold the cargo to the plaintiff on the terms stated in the judgment of the court, the captain of the vessel to proceed to Queen's Town at Drogheda, but he, acting on the terms, refused to do so; whereupon the plaintiff brought an action in Liverpool, on a plaint containing particulars of damages for non-delivery of the cargo and expenses in coming from Drogheda to Queen's Town.

*Milward* showed cause, and *Court* refused the writ.

It was contended that the County Court had jurisdiction, as the parties did not reside within the jurisdiction, and the action arose within the jurisdiction.



JUDGMENT.—*January 18.*

LORD CAMPBELL, C.J.—This was an application for a prohibition to the judge of the County Court of Liverpool, and we think that the rule ought to be made absolute, but with modifications. The application was for a general prohibition to stay all proceedings on a plaint. Now we are extremely reluctant to interfere with the jurisdiction of a County Court, unless its jurisdiction has been clearly exceeded; but if it has been, it is our bounden duty to interfere by granting a prohibition. In the present case there is a contract brought in the County Court in respect of a contract whereby it was agreed that a cargo of corn on board ship should be sold, and that it should be delivered at any port in the United Kingdom; and that upon handing over certain shipping documents and the policy of insurance, the price should be paid. At Liverpool there was a demand made on the vendor to hand over the shipping documents and policy of insurance, which he did not do; and the prohibition was brought by the purchaser upon that contract. Now, in the particulars of demand, it was stated that the action was brought for the non-delivery of the cargo; if it were only for that, that would not be a cause of action arising within the jurisdiction of the County Court of Liverpool, because the cargo was to be delivered at Drogheda, and might have been delivered at any part of the United Kingdom. But under this plaint it is possible that the plaintiff may proceed for a cause of action within the jurisdiction of the County Court of Liverpool, for not having handed over to the defendant the shipping documents, with the policy of insurance. The contract was made in Liverpool, and the breach of it took place in Liverpool; therefore we cannot say that there should be a general prohibition. There are ancient authorities to show that there may be a partial prohibition. I remember those authorities being acted on in the case of *Dr. Frees*, which was a suit in the Ecclesiastical Court for immoralities, some parts of which were barred, and prohibition was granted with respect to all which were barred by the statute. Now we think the proper course will be to grant a prohibition against proceeding on that breach which is not in the jurisdiction of the County Court; and therefore we think the rule should be made absolute, prohibiting the plaintiff from proceeding upon the said plaint in respect of the breach of contract mentioned in the particulars to the said plaint annexed, and that was for not delivering the cargo. Now this will allow the plaintiff, although he is prohibited from proceeding for that which was contracted for as to the cargo, still to proceed under this plaint for the breach of contract in not delivering over the shipping documents and policy of insurance at Liverpool; and then he may apply to the judge of the County Court, and the judge of the County Court may, in his discretion, allow the particulars to be amended, and to be restricted to that breach of the contract which took place within the jurisdiction of the County Court. Therefore the rule will be made absolute to that extent.

*Rule absolute accordingly.*

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IONIDES.  
—  
1853.

Prohibition—  
Jurisdiction.

*Jurisdiction of the County Court*  
*Statute 9 & 10 Vict. c. 95, enacts, "that the jurisdiction of the County Court shall extend to the recovery of any sum not exceeding the sum of 20l. which is the whole or part of a partnership account, or the amount or balance of a distributive share under an intestacy, or of a will." By 13 & 14 Vict. c. 61, s. 1, the jurisdiction is extended to the recovery of any demand not exceeding 50l. brought in the County Court of Kent to recover a legacy from the executors. This involved a question of devolution. The judge, doubting his jurisdiction, gave judgment for the defendant. Held, that the above clauses gave him jurisdiction, and that there should be a new trial:*

*Seem, that when a judge has doubts about his jurisdiction, he should exercise it.*

**T**HIS was an appeal from the decision of the judge of the County Court of Kent, at Margate, upon a case settled by the following is a copy of the case as settled:

"This was an action to recover a legacy of 50l., claimed by the plaintiff, against the defendant. By his particulars abandoned any excess on account of costs. Charles Winch, the father of the plaintiff, died on the 13th September 1850, having by his will, dated the 13th September 1850, and bequeathed certain real estate, and all his real and personal estate, to Mary Radcliffe and the defendant. And he directed the trustee to convert the same into money, and therefrom to pay the funeral and testamentary expenses; and to place to pay the following legacies, viz.: To the plaintiff 50l.; to each of his sons, Charles Winch and John Winch, 20l.; and to his son James, 20l.; and he directed that the residue should be retained by and paid to his said daughter."

the trustees and executors of this my will shall allow him my said son Frederic Winch the period of six years to pay the same without interest; provided he my said son Frederick Winch shall liquidate such debt by instalments of not less than 50*l.* in each of the first five years of such period of six years; the first instalment to be paid at the expiration of twelve calendar months from the day of my decease.' And the testator appointed the said Mary Radcliffe and Amy Winch executrices; and he empowered them, 'notwithstanding anything therein contained which might appear to be construed to the contrary, to compound or allow time for the payment of any debt or debts due to his estate, and to satisfy dividends against his estate, whether by strictly legal evidence or not, and to settle all accounts between him and any person or persons on such terms as they his said executors should in their discretion think expedient, and to refer any matters of difference relating to his affairs to arbitration.' Mary Radcliffe died, and the will was proved by Amy Winch alone on the 14th Feb. 1850. On the hearing of this cause assets were admitted to have been received by the defendant to the amount of 2638*l.*, and it was admitted that she had paid the funeral and testamentary expenses and debts of the testator to the amount of 2735*l.* It was also admitted that no money had been paid by Frederick Winch the defendant in respect of his debts, but she had in the month of January, 1851, commenced an action of debt against him in the Court of Exchequer of Pleas, and obtained final judgment (in an undefended action) for 681*l.* 17*s.* 10*d.*, besides 21*l.* 12*s.* 7*d.* for interest. The judgment was obtained on the 26th day of February 1851; but the defendant did not take any further proceeding under the judgment until the 25th January, 1852, when a *fi. fa.* was issued and the stock-in-trade and effects of Frederic Winch (who was a trader at Margate) were seized. The execution was, however, defeated by the subsequent bankruptcy of Frederick Winch. The plaintiff, under these circumstances, sought to charge the defendant with assets, alleging that she, the defendant, was liable to the payment of the *devastavit*.

"The court, however, doubting its jurisdiction, gave judgment for the defendant, against which the plaintiff appeals.

"The question for the opinion of the court is whether, under the 65th section of the 9 & 10 Vict. c. 95, as extended by the 13 & 14 Vict. c. 31, the judge of the County Court has jurisdiction to charge the defendant under the above circumstances with the payment of the legacy.

"(Signed) CHARLES HARWOOD."

*Byles*, Serjt., for the plaintiff.—The question for the court is, whether the County Court has jurisdiction under the 65th section of the 9 & 10 Vict. c. 95, as extended by 13 & 14 Vict. c. 61, s. 1, to try a question which, in the Superior Courts, would be called a *devastavit*. I do not quite understand why the judge doubted his jurisdiction. *Piers v. Wilson*, 6 Ex. 833, seems to be decisive on the point.

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WINCH.  
1853.

Jurisdiction.

WILSON  
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WILSON.  
—  
1853.  
—

*Jurisdiction.*

MAULE, J.—The Act gives jurisdiction to try a quest legacy, and that implies jurisdiction to try a *devastavit*. The section says expressly that the jurisdiction shall extend to recovery of an unliquidated balance of a partnership account. That is much the same kind of question.

*Byles*, Serjt.—To ascertain what the share of the residue in *Piers v. Wilson*, it is necessary to see what claims there are on the assets.

*Channel*, Serjt. for the defendant.—The only point is, the executrix is also trustee; and there is a discretion given to trustees to compound or allow time for the payment of any debt.

MAULE, J.—Well, that would be evidence in a *devastavit*.  
JERVIS, C. J.—It is unfortunate that counsel were not employed in this case before the judge of the County Court. The judge seems to have forgotten the old maxim to “amplius” should have thought where he entertained doubts about jurisdiction, he would have exercised it. There must be a trial; but as the point was started by the judge, there will be no order as to costs.

*New trial.*

## BAIL COURT.

*January 29, 1853.*

(Before ERLE, J.)

NUTTING v. NUTTING.

*County Court—New trial with a jury, when the former one was before the judge alone.*

*plaint was tried in the County Court before the judge alone, who gave judgment for the defendant. Subsequently a new trial was granted in general terms. Upon this the plaintiff gave notice of his intention of having a jury, and at the trial a jury appeared, when the judge refused to try the cause by such jury, as he had given no leave for a jury, and the cause was accordingly struck out. Upon an application to this court for a mandamus to compel the judge to try by a jury: Held, that under the 79th rule of the new County Court rules, a party has an absolute right to a jury, notwithstanding the former trial was without a jury.*

*N Michaelmas Term, Lush obtained a rule nisi for a mandamus commanding the judge of the County Court of Kent, holden Margate, to try this cause by a jury. From the affidavits it appeared that the cause had previously been tried before the judge himself, and without a jury, when judgment was given for the defendant. Subsequently the plaintiff applied for and obtained an order for a new trial. Upon this he gave notice of his intention to try the cause by a jury, and upon the day of trial accordingly a jury was in attendance. The judge however objected to try the case before a jury, inasmuch as he had given no leave for one, and he directed the cause to be struck out.*

*Chambers, Q. C., and Simons, now showed cause, and contended that as the judge had not given any leave for the second trial to be tried before a jury, the plaintiff was not entitled to have one; the 79th section enacting that the judge shall have the power, "if he shall think fit, to order a new trial to be had upon such terms as he shall think reasonable."*

*Lush, in support of the rule, argued, that although by the old County Court rules a second trial as in this case could not be had before a jury, inasmuch as rule 20 required that "every notice of demand of a jury, must be made in writing to the clerk of the court, two clear days before the return of the summons," yet under the 79th rule of the new rules, the demand of a jury need only be made "two clear days before the day of hearing."*

*ERLE, J.—I think that the judge had no right upon the second trial to refuse hearing the case before a jury. Upon such a trial I am of opinion that the party had a right to have a jury.*

*Rule absolute.*

## COURT OF EXCHEQUER.

January 17, 1853.

AVARDS AND WIFE, App. v. RHODES, Resp.

*County Court—Jurisdiction—Plaintiff crediting a set-off to balance below 50l.—Abandonment at the trial of excess above.*  
*A plaintiff claimed as due to him a sum exceeding 50l. but reduced below that amount by giving defendant credit for a set-off, and the County Court for the balance. The defendant had never to the set-off, or allowed it as part payment, or to the balance account reducing the plaintiff's claim below 50l. The County judge thought at the trial he had no jurisdiction. The plaintiff agreed to abandon the excess above 50l. to give jurisdiction; judge thought it was too late then to do so, and the plaintiff was*  
*sued:*

*Held, that the County Court judge had no jurisdiction under the circumstances, and, having no jurisdiction at the commencement of the plaintiff could not at the trial abandon the excess to give juris*

THIS was an appeal from the County Court of Kent, holden at Tunbridge Wells, and arose from an action brought in the County Court to recover compensation for services rendered by Mahala Avards, the wife of Thomas Avards, to the defendant. The particulars of the plaintiff's demand, which were annexed to the summons issued in this cause, were as follows:—

In the County Court of Kent, at Tunbridge Wells. Particulars of plaintiff's demand—

|                                                        |   |    |  |
|--------------------------------------------------------|---|----|--|
| To thirteen weeks service of Mahala Avards, from       | £ |    |  |
| Oct. 11, 1841, to Jan. 11, 1842, at 4s. per week . .   |   | 2  |  |
| To three years service from Jan. 11, 1842, to Jan. 11, |   |    |  |
| 1845, at 3s. 6d. per week . . . . .                    |   | 27 |  |
| To three years and a half service from Jan. 11, 1845,  |   |    |  |
| to July 18, 1848, at 3s. per week . . . . .            |   | 27 |  |

57

|                                             |    |    |    |
|---------------------------------------------|----|----|----|
| Paid by defendant on plaintiff's behalf, at | £  | s. | d. |
| different times . . . . .                   | 15 | 0  | 4  |
| Received by cash at different times . . . . | 4  | 0  | 0  |

19

£38

An objection was taken on the part of the defendant that the amount of the plaintiff's claim exceeded the sum of 50*l.*, and that, therefore, the court had no jurisdiction to try the cause. In answer to this objection, it was suggested that the defendant had given notice of the set-off stated in the particulars of demand in a counter action, which had been brought in the same court by the said Mahala Avards alone against the said defendant, in which action the plaintiff was nonsuited, on the ground that she was a married woman; but there was no evidence tendered of an account rendered, or of any settled and agreed balance between the parties. The judge decided that he had no jurisdiction to try the cause, the plaintiffs not being at liberty to introduce matter of set-off to bring their claim within the jurisdiction of the court. The plaintiffs then offered to abandon so much of the said sum of 57*l.* 4*s.* as exceeded the sum of 50*l.*, so as to bring their claim within the jurisdiction of the said court; but the judge decided that this was not a case in which the plaintiffs were at liberty to abandon the claim as at the trial, and nonsuited the plaintiffs. The questions for the opinion of the Court of Exchequer are: first, whether the plaintiffs could, by the admission of payments, and by introducing matter of set-off, bring the case within the jurisdiction of the court; secondly, whether the plaintiffs ought to have been allowed, at the trial of this cause, to abandon so much of the said sum of 57*l.* 4*s.* as exceeded the sum of 50*l.*, so as to bring their claim within the jurisdiction of the said court.

*Macnamara*, for the appellants.—The County Court had jurisdiction, as the balance which it sought to recover was within 50*l.* The objection that it was reduced by set-off ought not to prevail, there being evidence that it was due on a settled account; therefore the County Court had jurisdiction. The judge should have directed into the fact whether it was such a balance or a mere matter of set-off, in order to determine whether he possessed jurisdiction: (*Kimpton v. Willey*, 1 L. M. & P. 280; S. C. 19 L. J. 1, C. P.; 1 Cox & Macrae, 350.) Secondly, if the items for which credit is given cannot be taken into account, so as to reduce the claim within 50*l.*, there was an abandonment of the excess, and by such abandonment the demand was reduced to an amount of which the County Court might take cognisance within the meaning of the 63rd section of 9 & 10 Vict. c. 95, and the 13 & 14 Vict. c. 61, s. 1, extending the provisions of the former Act to all debts, damages, and demands which may be sued for in the said courts, or any of them, not exceeding the sum of 50*l.* The abandonment was made at the hearing; and that, it would seem from the case of *Isaac v. Wyld*, 7 Ex. 163; 1 Cox & Macrae, 556, is a proper time to make it. (*Vines v. Arnold*, 8 C. B. 632; *Edwards v. Newman*, 7 C. B. 654; and *Bremskill v. Powell*, L. J. 362, Ex. were also cited.)

*Bovill*, contra.—This was a claim for an amount exceeding 50*l.*, and the County Court had no jurisdiction. There was no evidence there being any settled balance or agreed amount; and the only

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WIFE  
v.  
RHODES.  
—  
1858.  
—  
Jurisdiction—  
Set-off.

1 Cox & Macrae, 243.) Instead of applying for a writ, he may if he choose, appear at the hearing, and object to the jurisdiction, as was done in this case; and the judge, saying he had no jurisdiction.

*Macnamara*, in reply.—*Isaac v. Wyld* was distinguished from *Isaac v. Capper*, and decides that the mere amendment of the plaint does not oust the jurisdiction of the County Court.

#### JUDGMENT.

POLLOCK, C. B.—The questions submitted by the County Court are—whether the plaintiff's admission of payments, and on introducing matter into the case within the jurisdiction of the court; secondly, whether the plaintiffs ought to have been allowed at the trial to abandon so much of a sum of 577. 4s. as exceeded the sum of 200. 0s. so as to bring this cause within the jurisdiction of the County Court; and the judge is of opinion that the learned judge was right on this point. The jurisdiction of the County Court, by the 58th sec. of the County Courts Act, 1888, extends to "all pleas of personal debt or damage claimed is not more than 200. 0s., whether of account or otherwise." The term "balance of account" is defined in the Act as "the balance of an account after payment of part,—after the allowance of set-off, or after payment of part, and not when the plaintiff claims after a simple set-off." This was so held in *Wood v. Baines*, 7 C. B. 654; 6 Dowl. & L. 183; and *Benswick v. Baines*, 669; and in the latter case, where the plaintiff's claim was the balance of an account originally of 175L., and the proposed set-off, the Common Pleas granted a writ of certiorari, 13 & 14 Vict. c. 61, s. 1, has now extended the jurisdiction of the County Court to the same limitations. In the case now



4s., and a demand on the face of the summons which the plaintiff would have to prove: and this is a demand which the County Court had no jurisdiction to try. It was, however, conceded that the case of *Kimpton v. Willey*, 19 L. J. 269, C. P.; 1 M. & P. 280, laid down a different doctrine from that in which the above-cited cases proceeded, and decided that a person might sue for more than 50*l.*, and reduce his claim afterwards by allowing set-off, or abandoning the excess beyond 50*l.* From the report both the L. J. and L. M. & P., as to the opinions of Wilde, J., and my brothers Williams and Talfourd, it would appear that the ground for which the rule for a prohibition was discharged was, that the affidavits were not sufficient to show that there was an excess of jurisdiction. My brother Maule is reported to have held that, with respect to claims above 20*l.*, there was only an implied prohibition from *giving judgment* for more than that amount, arising from the enabling clauses of the 58th and 63rd sections. But this is probably incorrectly reported; it seems to us at variance with the decision in *Beswick v. Capper*, and the words of the Act (s. 58), that all pleas of personal actions, where the debt or damage claimed is not more than 20*l.*, may be holden in the County Court. It cannot be that the judge may investigate claims to any amount, provided his judgment does not exceed the limit of 50*l.* It is, no doubt, where the plaintiff claims a balance of 50*l.* only, it may happen that the judge may have to investigate demands to a much larger amount; and if there be any part payment or set-off allowed to, it may be required that the plaintiff shall prove a sum which will out-top that payment or set-off, and which may much exceed 50*l.*; but that is made necessary by the introduction into the Act of the terms "balance of accounts," that is, over and above all payments; and is a very different case to a claim of a greater sum, with an offer of a set-off of one, reducing the amount to or below 50*l.* We think therefore that, according to the decision in these cases, the demand originally exceeding 50*l.*, being only reduced below it by offering to allow a set-off never agreed to as a part payment, was one over which the court had no jurisdiction. The offer to abandon the excess at the trial appears to us to make no difference, as the claim from the first was one over which the County Court had no jurisdiction. In that respect the case differs from *Isaac v. Wyld*, 7 Exch. 163, where the sum on the face of the summons and particulars did not exceed 50*l.*, but was taken out of the jurisdiction by the proof that it was a portion of a debt originally exceeding 50*l.*; and when the plaintiff was permitted to abandon the excess beyond 50*l.*

AVARDS AND  
WIFE  
v.  
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—  
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—  
Jurisdiction—  
Set-off.

*Judgment affirmed.*

*County Court—Construction of will—Mortgage—Arrears—Question of title and jurisdiction—Repairs of mortgage—Liability of general estate for.*

*Testator by his will bequeathed as follows :—" To my all my interest and claim on household property is belonging to the successors of the late J. H., on mortgage of 1500l. ; also all my claims on the shops and premises occupied by, &c. ; likewise all moneys that I may be due to him at anytime, to him, his heirs and assigns for ever."* At the testator's death there were certain arrears of interest on the mortgage of 1500l., which were claimed from the estate by the defendant as executrix. She furthermore claimed repairs of the mortgaged property done in the lifetime of the testator. *Held, on appeal :—First, that the arrears of interest due at the testator's death passed with the principal to the defendant as executrix.*

*Secondly, that the defendant as executrix, and not the estate, was liable for the repairs done in the lifetime of the testator.*

THIS was an appeal from the County Court at Gateshead. The following is the case as learned judge for the opinion of this court :—

This is an action brought by the plaintiff to recover from the defendant the sum of 50l. for money had and received by the defendant for the use of the plaintiff. The claim amounted originally to 59l. 6s. 10d., but he abandoned the claim over 50l. in order to bring the case within the jurisdiction of the County Court. It appeared at the trial that one J. Gibbon, deceased, the late father of the plaintiff and husband of the defendant, was, at the time of making his will, and at the

is the last will and testament of William Gibbon, of the -hill, in the parish of Gateshead, miller. First, I give to ter Margaret Coleman, 850*l.* secured by way of mortgage old property situated at Howden Pans, belonging to the s Carlton's family. I also give to my said daughter Coleman wful money of this realm, to be paid to her or her heirs proceeds of my effects as soon as convenient after my To my son William Gibbon I give all my interest and household property in Percy-street, Newcastle-on-Tyne, to the successors of the late Joseph Hedley, gentleman, I have a mortgage of 1500*l.*; also all my claims on the d houses situated on the side of Newcastle, occupied by Perry, and others; likewise all moneys that I may have for him at any time, to him, his heirs and assigns for my daughter Mary Gibbon I give the sum of 2000*l.* of oney of the realm; also all my houses situated in Saville-ewcastle-upon-Tyne, to her and her heirs. I also do order shall have the privilege of living in the house which we at occupy, as long as Miss Beeson remains in the house she at present belonging to me in Saville-court, free from ge for board and lodging. The residue of whatever I may die possessed of I give in trust to my wife, Maria for the use of herself and son James Henry Gibbon, until s the age of twenty-two years: at the expiration of that shall give up all to him or his heirs, with the exception year which he shall pay to her during her natural life, by instalments,—that is, four times in the year. Should ames Henry die before, &c., without issue, then shall his ojoy the whole during her natural life; after her demise erty remaining shall go to my surviving children or their rest of kin. My widow shall pay my funeral expenses y just debts, without interfering with the legacies to my I do also order, that, within one month after my death, Villiam Gibbon receive 200*l.* to be paid by my widow and for whom I appoint John Geldart, wine merchant, New-ir. James Smith, Gateshead, Low Fell, and Mr. John chemist, Gateshead. My widow shall be principal , that is to say, shall receive and pay all, subject to the a of my trustees: should anything occur that may be con- n improvement to the property, my widow, with the of two of my trustees, shall be at liberty to make any as aforesaid; if by sale, the money to be invested in lic security for the benefit of the family. This I declare last will and testament, revoking and making void all former de by me. Signed, sealed, and declared this 27th May d I do hereby subscribe my name in the presence of the witnesses whose names are herein written, and in the of each other. William Gibbon: witnesses, Luke Blen-Matthew Thomas Clark."

ill was proved at Durham on the 8th February, 1847, by

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liquidate his debts, and the defendant, as executrix, the said several debts due by the testator for work to the said property, and the other debts of the testator William Gibbon, entered into possession of the Percy-court immediately on the testator's death, of the rents thereof, and he received for his own use 38*l.* 10*s.* 1*d.* which had accrued due in the testator aforesaid. The defendant, as executrix, being in possession of the mortgage deed and the other deeds relating to the property, refused to give them up to the plaintiff and she was paid the sum of 38*l.* 10*s.* 1*d.* for arrears of the sum of 21*l.* 6*s.* 9*d.* paid and incurred for repairs of the property, making together the sum of 59*l.* 16*s.* 10*d.* after some negotiation between the parties and the plaintiff, in order to obtain possession of the deed against the right of the defendant to such payment in consequence of the defendant's refusal to give up the deed the defendant the said sum of 59*l.* 16*s.* 10*d.*, and the plaintiff his deed.

The following is a copy of the account, shown and claimed by the defendant, and paid by the plaintiff  
Mr. Joseph Hedley, Dr.

To Maria Gibbon

1846.

December 26.—To balance of interest . . .  
Mr. Grant's bill for joiner's work . . .  
Mr. W. Hymer, for grate . . .  
Weatherland's bill, mason work, &c. . .  
Ormston's bill for painting . . .

curity passed only the capital, and not any arrears of interest owing at the testator's death. Secondly, that, as to the arrears of interest, there had been no assent of the defendant, as executrix, to such arrears being a bequest or legacy, and that consequently the plaintiff's remedy, if any, was in equity and not at law. Thirdly, that as to the money paid or incurred for repairs, the amount was a debt due to the testator, and was secured by the mortgage, and that consequently the defendant, as executrix, was entitled to hold and retain the deed until she, as executrix, was repaid the money paid and incurred for the repairs of the mortgaged property.

The learned judge was of opinion that the arrears of interest did not pass under the bequest contained in the will; and moreover that, without the assent of the defendant as executrix, the County Court had no jurisdiction over this part of the plaintiff's demand; that, as to the money paid for repairs, the defendant, as executrix, was entitled to retain the deed until the money so paid was reimbursed to her as such executrix. He therefore directed judgment to be entered for the defendant or a nonsuit, at the option of the plaintiff. The plaintiff refused to be nonsuited, and judgment was entered for the defendant.

The plaintiff appeals against this judgment.

The question for the opinion of the Common Pleas is, whether the judgment of the County Court judge is correct or not.

*Milward* for the plaintiff.—The main question in this case arises as to the construction of the will of the testator, William Gibbon; that be disposed of, the other point will follow. [MAULE, J.—Did not the point on the will raise a question of title? Nothing of the kind arose at the trial. [CRESSWELL, J.—But you raise it now; you say your client is entitled to the land, and not to the £1500L. raised on the mortgage.] The testator had no estate in the land. [MAULE, J.—He was seised in fee of the land.] He died, no doubt, an equitable estate in fee, but he had no legal estate in the land. The main question discussed at the trial was at which is raised here—whether the arrears of interest passed under the bequest in the will as well as the land. It is submitted that they did, and that is plaintiff's first point. The 65th section of 10 & 11 Vict. c. 95 extends the County Court's jurisdiction "to the recovery of any legacy under a will." The other side will oppose this the words of sect. 58 in the same statute, which says the County Courts "shall not have cognisance of any action in which the validity of any devise, bequest, or limitation under any will or testament may be disputed;" but here, in fact, the devise is not disputed, therefore title to land does not come into question. If, however, any point as to the jurisdiction of the County Courts does arise here it cannot now be taken, as it was not raised in the court below. The only questions raised before the County Courts judge are stated in the case (*ubi supra*), and the case is silent as to this question being mooted. As to the question whether or not the language used by the testator passed the arrears of interest we must look to the Wills Act, which says that the will shall speak

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v. *Udall*, 2 Exch. 20, 12 Jur. 274.) This last case is a strong authority in favor here contended for: (*Hunt v. Tapley*, 11 Jur. 904.) only cases which bear on the first point. The Court held that the language of the bequest did not pass interest; and in that, it is submitted, he was wrong. The question is, whether the amount due to tradesmen for mortgaged property, done before the death of the testator, is chargeable on the plaintiff, or on the defendant as testator. They were debts incurred by the testator and he was as much bound to pay them as to pay his creditors. Besides this, the mortgagee has his remedy from the improvements done to the property, and any reason for not recovering in such manner could be recovered as for work done, not as for money paid. [JERVIS, C. J.—If the testator paid these debts before his death, the devisee would have no claim over from the mortgagor.] Yes, that is so. The remedy is as to the necessity of assent from the executrix, in the exercise of jurisdiction. This point is by no means clearly settled, and must be given in its own terms (*ubi supra*.) The Court judge seems to have overlooked the 65th section of the original act, already cited, and to have forgotten that it is an equity as well as a common law judge. [JERVIS, C. J.—He seems to have thought that plaintiff's right to recover does not arise before him, except through the assent of the executrix. She has consented to the bequest of the whole lot, and where a party assents to the bequest of the whole, the latter carries the incidents along with it. On these facts, the plaintiff, it is submitted, is entitled to the judgment of the court.]

*Udall*, for the defendant.—The decision of the Court is right. The court is here asked to set aside a :

as paid under duress; without doing this, he cannot have judgment. The question in reality resolves itself into this:—Who was entitled to the mortgage deeds? At the testator's death, the estate, if not devised, goes to the heir-at-law, and the contract to an executor. What is the onerous duty which devolves upon an executor? The mortgage deed being the security for the debt, goes to the executor and not to the heir. It is so laid down in *McC. Abr. tit. "Exec." H. C.*; 2 Williams' Executors, 506. The title-deeds were delivered up upon a good consideration. [MAULE, J. You say that the 1500*l.* being a debt, went to the executrix; that the title-deeds being incident to that debt, passed also with her, and that the arrears of interest went to the executrix.] Yes, effect that is so. Then comes the question of assent. [MAULE, J. I think the conduct of the defendant amounted to an assent.] When it must be an assent to something on behalf of the whole. It is clear the defendant never assented, because she never parted with the title-deeds. [Milward.—I am not in a condition, as she stands, to ask judgment for the plaintiff, but only for a new trial.] We contest the right of the plaintiff to the title-deeds. The defendant if she pleased was justified in keeping them, whatever sum the plaintiff might have offered for them. They were worth as much her property as the plaintiff's, and nothing has since been done to deprive her of that right. She was also entitled to the interest: (*Spode v. Smith*, 3 Rep. 511.) That case shows that the assent of the executrix is a valid consideration for the money she received. The case cited from Atkyns (*supra*) also shows that arrears of interest did not pass under the will: (*Salmon v. Dean*, 1 Jur. 302; *Gulliver v. Cousins*, 1 C. B. 788.) Then comes a question, is this a bequest or a devise? It seems to be a devise of land; if that be so, what right had plaintiff to sue in the County Court in this case? Title to land arises here. There being no jurisdiction in the court below, the defendant, even if she had assented, could not by such assent give jurisdiction. The validity of the devise also came into question; judgment therefore should be for the defendant.

PERVIS, C. J.—It appears to me that in this matter the appellant is entitled to all that he asks for—a new trial, but not to full judgment on the case. There are here undoubtedly several points which were not raised at the trial; it is enough, however, to answer the objections there taken. The first point was, whether the arrears of interest did or did not pass under the bequest contained in the will. The learned judge held that they did not so pass. With respect to this point, it is sufficient to say that the bequest was a specific bequest, as the judge determined; but the judge was wrong in holding that the arrears of interest did not pass under the will at the testator's death. According to my view, the judge was wrong in the construction he put upon the will. It is similar to the case of a claim on a bond, under a will containing the terms, where the interest passes. Then as to the next point, that there was no assent on the part of the defendant, and that a

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you are certain  
for.

was therefore liable. The judge having been w  
ment as to a portion of the case before him, we th  
is entitled to a new trial.

MAULE, J.—I am entirely of the same opinion :  
whether the arrears passed by the bequest in the  
pellant's claim comprehends the interest. If t  
merely bequeathed, say a sum of 200*l.*, that woul  
that passed; but in a case where the testator give  
“all my interest and claim on household prope  
belonging, &c. on which I have a mortgage of 15  
held that arrears of interest pass with the prin  
question of assent by the defendant, the negotiat  
parties seem to have led to a sort of *quasi* assent.  
have agreed to try whether the plaintiff was enti  
without paying the money—a very convenient a  
of deciding the real question. But that point is  
the court is clear upon the other questions. I thi  
is entitled to receive the money outlaid in rep  
ruled otherwise; and as there has been a misc  
plaintiff is entitled to all he asks for, namely, a ne

CRESSWELL, J.—I am of the same opinion. A  
of interest, I think the judge was wrong in de  
did not pass to the plaintiff under the will. As  
on the second point, I do not exactly know  
whether it goes to part or to the whole legacy  
case I think the plaintiff entitled to what he ask  
defendant could have no right to detain the title-c  
due from the testator.

WILLIAMS, J.—I am also of the same opinio  
two points in dispute, on both of which I think th  
the right and the defendant in the wrong. The tes



it there are difficulties in the case which prevent it. He  
 ver, entitled to a new trial, and must have judgment to  
 it.

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*New trial granted.*

## COURT OF COMMON PLEAS.

*January 24, 1853.*

FULLER, App., CHEVELEY, Resp.

*Contract by letter—Stamp—Nonsuit.*

*County Court the plaintiff tendered in evidence certain letters as  
 of the contract sued upon, and the judge admitted them,  
 they were not stamped; and the question whether they  
 ed to a contract between the parties was left by the judge to  
 :*

*appeal, that this was a question of law for the judge, and  
 fact for the jury, and the judgment, therefore, must be  
 i.*

*, that if the letters amounted to a contract, they were inad-  
 for want of a stamp.*

*& 14 Vict. c. 61, s. 14, the Court of Appeal has power to  
 : nonsuit to be entered, because in effect a nonsuit is a judg-  
 or the defendant.*

was an appeal from the County Court of Essex, held  
 Chelmsford; and the case stated for the opinion of the  
 Pleas was as follows:—

as an action brought by the plaintiff, who is a draper's  
 against the defendant, who is a draper, under the  
 particulars of demand:—"This action is brought to  
 50*l.* damages for breach of contract, by reason of the  
 t not taking the plaintiff into partnership in the month of  
 gust, or September last. Dated this 15th Oct. 1852." The  
 s tried by a jury in the County Court of Essex at Chelms-  
 8th Oct. 1852, when a verdict was found for the plaintiff,  
 damages. On behalf of the plaintiff a correspondence by  
 tween the plaintiff and defendant was put in evidence;  
 following are those which were relied on by the plaintiff  
 g the contract:

*From the plaintiff to the defendant.*

"Chelmsford, June 15, 1852.

Sir,—Almost ever since you left Chelmsford my brother's  
 s been declining, and for the last nine months he has been

market-days are bad. If you can recommend a  
obliged.—Yours truly, C.

*From plaintiff to defendant.*

“Margate, J

“Dear Sir,—I received yours in due time: in  
say, that I do not know of any one likely to suit  
of the class you want are not often to be met with

“If you will make it answer my purpose, and  
me, please write by return of post.—Yours respec

*From defendant to plaintiff.*

“Chelmsford, J

“Dear Sir,—I have been from home, or sho  
sooner. I never supposed your last was intended as  
fore will pass it over and reply to yours (of the 9  
as you appear anxious to start as a partner, I ma  
proposal to you:—To give you for the first two y  
the business; at the end of that time, if we go  
give you an equal share. You may consider  
worth to you from 150*l.* to 200*l.*,—all our other a  
be the same as my brother's,—rent of premi  
employed 3000*l.*, allowance for young men and  
week per head, which includes coal, beer, and wea  
is all. The furniture in the house to be yours, tal  
you and my brother agree upon. The buying and  
I reserve to myself, although I shall at any time b  
of it: the stock to be taken fairly between r  
yourself.

the day mail, and also in the greatest noise from the election; but this is satisfactory to you it will be better to have a copy of agreement drawn first.—Yours truly,

C. CHEVELEY."

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*From plaintiff to defendant.*

"Margate, 16th July, 1852.

"Dear Sir,—In reply to yours of this morning, I beg to state I am ready to accede to your proposal. With regard to time, if you could possibly defer my coming until the second week in September it would suit much best, as our season is at the height. Perhaps when you forward the agreement you would name the latest time.—I remain, yours obliged and respectfully,

W. FULLER."

County Court—  
Contract by  
letter—Stamp  
—Nonsuit.

*From defendant to plaintiff.*

"Chelmsford, July 19, 1852.

"Dear Sir,—Mr. Veley is in London; but I will see him tomorrow, and get him to draw a copy and forward to you. The time is very important, and ought not to be later than August; your harvest will then be over, and there will be a little more doing; besides, I shall want to be buying a few autumn goods.—Yours truly,

C. CHEVELEY."

*From defendant to plaintiff.*

"Chelmsford, July 21, 1852.

"Dear Sir,—If you have not named your leaving to Mrs. Hosling, you had better not do so for a few days, or until you hear from me again, as a circumstance, quite unexpected and very important, has occurred, which may compel me to alter my circumstances.—Yours truly,

C. CHEVELEY."

*From plaintiff to defendant.*

"Margate, 22nd July, 1852.

"Dear Sir,—I have made every arrangement to leave at the end of August; have engaged a young lady, also a young man; expect him on Saturday next. I thought it would be better to give him as soon as possible, to get used to the business before I go. Must say was very much surprised at the contents of your letter.—Yours respectfully,

"W. FULLER."

A letter of 23rd July, from defendant below to plaintiff, in which the defendant Fuller stated that circumstances had occurred which prevented him from carrying out the proposed arrangements with the plaintiff below, was put in at the trial, and closed the correspondence.

The questions for the opinion of the court are—

1st. Whether the letters forming the alleged agreement should have been admitted in evidence by the court without being first stamped.

2nd. Whether a determination of the said court, not to nonsuit the said plaintiff on the ground that the said letters so admitted in

and particularly this is so with reference to a matter, that is to say,—the period when the partnership commenced: (*Wontner v. Shairp*, 17 L. J. 38, C. C. *Fletcher*, 16 L. J. 173, Ex.; *Routledge v. Grant*, 16 L. J. 173, Ex.; *Harford*, 8 M. & W. 806; *Morrill v. Frith*, 3 M. & W. 806; *Phillips v. Afflato*, 4 M. & G. 846.) Lastly, if the letters constituted a contract, as they had no stamp, they were invalid, and the plaintiff below ought to have been nonsuited.

*Channell*, Serjt. for the respondent, was not called. *JERVIS*, C. J.—It seems to me that in this case the decision was wrong. It is a simple question of the construction of the written documents, and as such was for the decision of the court and not for that of the jury. However, as it has been decided against us, we must reverse the judgment, for the plaintiff is in a dilemma: either the letters stated in the case amounted to a contract, or they do not; if they constitute a contract, they are invalid because they require a stamp; if they do not constitute a contract, then the plaintiff's case failed, and judgment must be given for the present appellant. Unless we have power to order a new trial, there must therefore be a new trial.

*Honeyman*, after referring to the 13 & 14 Vict. c. 61, which enacts as follows:—"that the Court may either order a new trial on such terms as it thinks proper, or may order judgment to be entered for either party, as the court may think proper, and may make such order with respect to the costs of the appeal as such court may think proper, and such order shall be final." The question that arises on this clause is whether judgment of nonsuit can be said to be a judgment for

## COURT OF QUEEN'S BENCH.

*February 4, 1853.*

Before COLERIDGE, WIGHTMAN, ERLE, and CROMPTON, JJ.)

MOUNTNEY v. COLLIER.

*Landlord and tenant.*

**An action for rent, the tenant, although he has not quitted possession of the premises, may show that his landlord's title has expired, by notice to quit given by the rightful claimant to the landlord, and notice to tenant not to pay further rent; and he may further show the right of the party claiming by the declarations of the deceased person through whom the landlord came into possession as personal representative.**

**THIS** was an appeal against the decision of the judge of the Uttoxeter County Court, Staffordshire.

**The action was brought to recover a year's rent (32*l.* 10*s.*) of messuage and land called the Shoulder of Mutton, due at Lady-day, 1852. The defendant paid 14*l.* 2*s.* 5*d.* into court.**

**It appeared that the plaintiff let the defendant the premises, consisting of a house and ground, land and outbuildings, shortly before Michaelmas-day, 1850, at 32*l.* 10*s.* a year. The defendant paid half a year's rent when due, at Lady-day, 1851, and had continued in possession down to the present time, but had paid no other rent.**

**The plaintiff succeeded, as personal representative, one Cotton, father-in-law, in the occupation of the premises. Cotton had let other premises of one Ingram, for which he paid rent; and paid also 1*s.* annually as for a sill of land, which was subsequently increased to 10*s.* per annum. This latter sum the plaintiff continued to pay to Ingram; but what that sill of land was, or where situate, there was no satisfactory evidence.**

**The plaintiff alleged that the 10*s.* were paid for an encroachment made by reason of an enlargement, about 1830, of the house called the Shoulder of Mutton, when a part of the said house and land was extended and built upon land belonging to the said Ingram.**

**Ingram, in right of the said payment, claimed the said Shoulder of Mutton and the rest of the premises, and gave notice to the**

The defendant also contended that Ingram's title of the premises in question, and excluded it from the County Court; but the judge held that the defendant could not dispute the title of the plaintiff, by whom he had been in possession of the premises. The judge also stated that he gave judgment for the defendant on the ground being entire and issuing from the whole of the premises, notice to quit having determined the plaintiff's title of the part for which the 10s. were paid, viz. the title to the Shoulder of Mutton, he could not apportion the title of the remainder.

*Badeley*, for the appellant.—This was a mere question of landlord and tenant. The plaintiff let the premises to the defendant for a year's rent; and the defendant paid 14l. 2s. 5d. into court. This admits the tenancy. The plaintiff's notice to quit from Ingram ought not to have been received because it amounts to *nil habuit in tenementis*, and is incompetent to the defendant to set up such a defence as to controvert the continuance of the title of the plaintiff whose demise he continued to hold:” (*Balls v. Wells*, 12.) There was no evidence here of commencing a new tenancy under any other person, or of any eviction of the defendant.

*Gray*, for the respondent.—This is a case in which the plaintiff's title had expired during the term. The plaintiff, as representative of Cotton, took possession of the premises after Cotton's death; the declarations of Cotton therefore as to the 10s. were receivable. They would have shown that the title was for the Shoulder of Mutton, and that Cotton held under Ingram. Then Ingram's notice to quit determined the plaintiff's title to the Shoulder of Mutton. The

. C. 538; *Newport v. Hardy*, 2 Dowl. & L. 921; *Doe v. Seaton*, C. M. & R. 728; Com. Dig. "Estoppel," E. 8.)

*Badeley*, in reply.—Cotton's declarations were not admissible. Ingram's title is no defence unless something was done under it, the tenant was evicted. The defendant should have shown that his occupation was not by the sufferance of the plaintiff. There must be a substantial and *bonâ fide* claim of title to oust the jurisdiction of the County Court and the proposed evidence was not sufficient for that purpose: (*Lilley v. Harvey*, 11 L. T. Rep. 273.)

COLERIDGE, J.—It is conceded on the part of the respondent that the judgment cannot be sustained; and the point that has been mainly argued turns on this, whether a tenant may show that a title of his landlord has expired during the tenancy, though he has remained in possession till the end of his term. I think it clear that, under certain circumstances, he may show that; and that he is at liberty to do so when the circumstances are such as, though not an actual eviction, yet are tantamount to it. It would be hard on a man who assents to the new title if he might assent to a new arrangement with the party claiming, without going out. Another point in this case is, whether or not the declarations of Cotton are receivable in evidence, to show that in the first instance there was a holding under Ingram as to the premises called the Shoulder of Mutton and the other premises, that some rent was paid for them by Cotton to Ingram. Upon Cotton's death the plaintiff comes into possession as his personal representative, and makes a contract with the defendant, at the same time Ingram gives the plaintiff notice to quit the premises. The plaintiff thereupon goes out of certain portion of the premises, and, according to the language of the judge, the notice to quit had determined the plaintiff's tenancy as to the premises, for which he paid the 10s. What, therefore, has been done between Ingram and the defendant is this: contemporary with or preceding the notice to quit, Ingram had gone to him and said, I forbid you no longer paying rent to the plaintiff, and thereupon the defendant refused to pay any rent to the plaintiff. The judge found that he had determined the tenancy as to some part of the premises. The defendant then proposed to supply the gap by Cotton's declarations, that the rent was paid for the Shoulder of Mutton. Now declarations of a deceased tenant, as to the party under whom he held, have always been admissible in evidence, and I cannot see why they are not receivable to let in that part of the case as proposed. Suppose a tenant in fee lets for a term, and the lessee underleases, and then the tenant in fee determines the term, may the underlessee holding on show the termination of the *mesne* tenancy? That seems to me no more than showing that his landlord's title has expired. If, then, the declarations of Cotton ought to have been received in evidence, they might have gone to raise a question of title between Ingram and the plaintiff, when it would have been the duty of the judge to surcease and go no further into

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question. Several matters are agreed on which mention of title. It was contended by the plaintiff that he paid for a part of the house only; and by Ingram that he paid for the whole house, that it was paid for the whole house, that it was paid for the whole house, that it was not a mere stranger; but he occupied the premises for 10s. a year to Ingram. There was no sufficient ground for excluding the declarations of Cotton.

ERLE, J.—The question in dispute was, whether the plaintiff was at liberty, without giving up possession of the demised premises, to show that his landlord's title had expired. I think the defence was admissible. Since *Balls v. Westwood* several decisions to the contrary of what was there decided, such decisions have reason on their side. If this tenant would be liable to pay to his landlord, and if he is entitled to the premises, and it is not right to make him pay twice. If that defence was admissible, it is for the plaintiff to show whether the defence is raised *bonâ fide*; and if it is, the question of title at once arises. Cotton's declarations were intended to show that the title was in Ingram; for it was that he had paid rent for these very premises. If the plaintiff is the representative as executor of Cotton, this was a question of title, the jurisdiction of the Court at an end.

CROMPTON, J.—I do not know whether it has been decided whether, when the tenancy has expired as to part, there is an action for the rent *pro tanto*. But, without that, there should have been an eviction or not, I agree with the court that the question of title arises, and that the jurisdiction of the County Court from going on with

*New*



## VICE-CHANCELLOR STUART'S COURT.

*March 12, 1853.*

RATCLIFFE v. WINCH.

*actice—Legacy—Devastavit—Administration suit—Injunction.*  
*atee will be restrained from proceeding in an action in the County*  
*rt under section 65 of 9 & 10 Vict. for a legacy under 50l., after*  
*ree pronounced in a suit in this court for the administration of*  
*testator's assets, although the legatee submitted to take a judg-*  
*ment against the executor de bonis propriis only, on the allegation of a*  
*astavit.*

DUPELL, Q. C., moved in this suit, in which a decree for the administration of a testator's estate had been pronounced, a legatee might be restrained from proceeding in an action commenced in the County Court against the executor (the defendant in this suit) for his legacy (under 50l.)

*ipp*, contra, submitted that the right to sue for a legacy under 50l. in the County Court having been expressly given by the 9 & 10 Vict. c. 95, s. 65 (extended by the 13 & 14 Vict. c. 61), this court should not restrain a legatee from pursuing his right. In this case the legatee alleged a *devastavit*, and asked for judgment against the executor *de bonis propriis*, and he was ready to submit to take judgment only, instead of the usual judgment.

The MASTER of the ROLLS said this was the common case. If the executor had wasted the assets, and therefore made himself liable *de bonis propriis*, this court would not allow any claimant, by a decree in a suit for administration of assets to go into the County Court and sweep away the assets of the executor, to the prejudice of the general class of legatees. His HONOUR granted the injunction.

CASTRIQUE v. PAGE.

*Repeal of proviso by subsequent inconsistent clause deprive plaintiff of costs—City Small Debts Act c. lxxvii., ss. 119, 120, and 121.*

*The City of London Small Debts Act, 14 & 15 Vict. deprives of costs the plaintiff in certain actions in superior courts, which might under that act have been tried in the Sheriff's Court, unless a verdict is given for more than 20l. By sect. 120, the plaintiff is deprived of costs in certain actions in superior courts, where less than 20l. is recovered, and where the plaintiff enters a suggestion.*

*Held, that the 119th section was not repealed or qualified by the 120th section, and that the effect of the whole act in relation to the plaintiff's costs was to deprive the plaintiff of costs where a sum amounting to more than 20l. was recovered by verdict, and a suggestion was entered to deprive the plaintiff of costs.*

PATERSON moved for a rule calling on the defendant to show cause why the roll should not be brought in for certification entered thereon, to deprive the plaintiff of costs in this cause, under the 14 & 15 Vict. c. lxxvii., s. 119 (City Small Debts Act.) The action, brought in this court, was on a writ of debt, and a verdict was found for the plaintiff for 27l. T. T. (Talfourd, J.) refused to certify. The affidavit sworn in the case within the provisions of the statute. The plaintiff resides in the city; and the plaintiff within the provisions of the defendant's residence; and this being so, the plaintiff is entitled to enter a suggestion, the sum recovered being over 20l.

costs; and if a verdict shall not be found for the plaintiff, the defendant shall be entitled to his costs, as between attorney and client, unless in either case the judge who shall try the cause shall certify on the back of the record that the action was fit to be brought in such superior court." The next material section is sect. 119, which provides "That if in any action commenced after the coming into force of this act in any of Her Majesty's Superior Courts of Record, in covenant, debt, detinue, or assumpsit, not being an action for breach of promise of marriage, the plaintiff shall recover not less than 20*l*., or if in any action commenced after the passing of this act in any of Her Majesty's Superior Courts of Record in trespass, trover, or case, not being an action for malicious prosecution, for libel, or for slander, or for criminal conversation, or for seduction, the plaintiff shall recover a sum less than 5*l*., the plaintiff shall have judgment to recover such sum only, and no costs, except in the cases hereinafter provided, and except in the case of a judgment by default; and it shall not be necessary to enter any suggestion on the record to deprive such plaintiff of costs, nor shall any such plaintiff be entitled to costs by reason of any privilege as attorney or officer of such court or otherwise." [JERVIS, C. J.—How is it possible the court can say that sect. 120 repeals the section which immediately precedes it? The two sections received the royal assent at the same time, and became law the same day; it would be an absurdity to say that.] Yes, the language of the statute is plain, and the two sections are not so contradictory that they cannot both be read together. For this reason the rule should be maintained.

*Pulling* showed cause in the first instance.—If the 119th section of the 15 Vict. c. lxxvii. were to prevail, a suggestion would not be proper; but the succeeding section has the effect of qualifying, or at least modifying, that section. The 120th section is entirely inconsistent with it, for the proceeding by suggestion is expressly taken away, and the depriving the plaintiff of costs is confined to the cases there expressly mentioned, *e. g.*, actions of trespass, &c., where less than 20*l*. has been recovered, and actions of debt, not being for malicious prosecution, &c., where less than 5*l*. has been recovered. The 119th section of the City Act was repealed on the 129th section of the 9 & 10 Vict. c. 95, whilst the 120th section of the City Act was the same as the 13 & 14 Vict. c. 11, s. 11, by which the former act was amended. If the provisions under consideration were found in different statutes, one would have repealed the other. (See *Ex parte Carruthers*, 9 East, 351; *Rex v. Northleach Union Roads*, 5 B. & Ad. 978.) A statute may be impliedly altered by a subsequent statute of the same session containing inconsistent provisions (*Paget v. Foley*, 2 Bing. 691); and if a proviso in an act of Parliament be repugnant to the purview, it operates *pro tanto* as a repeal, for it contains the intention of the Legislature: (*Attorney-General v. Chelsea Waterworks Company*, Fitzgibbon's Reports, 195.) The City Act is a local act, and must be construed strictly, as it deprives the

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the writ. Sect. 39 provides "that such sum provided the defendant or one of the defendants carry on business, or have employment within the or the liberties thereof, at the time of the act provided the defendant or one of the defendants or carried on business, or shall have had employ some time within six months next before the time brought, or if the cause of action either wholly therein." The suggestion has been taken away by and it may well be asked, Is an important clause to be nullified by a clause in a mere local act, a Small Debts Act? [JERVIS, C. J.—The court cannot take the act as we find it.] The court is a local act strictly where it interferes with a right Statute of Gloucester.

*Paterson*, in reply, was not called on.

JERVIS, C. J.—It seems to me that this suggestion entered as prayed. Much might, no doubt, be said in support of the plaintiff's view of the statute, and possibly there has been some error in framing the 119th section. But the duty of the court is to interpret the law and not to amend acts of Parliament; and though I understand why the law in the city of London should differ from that of the rest of the kingdom, yet, as the language of the sections is not conflicting, it is impossible for the court to say that the Legislature had not intended the sections should be as they are. The present statute, in substance, says that if the damages recovered do not exceed 50*l.* in contract, and more than 5*l.* in tort, the plaintiff should have no costs entered a suggestion; and that where the damages do not exceed 20*l.* in contract, or amount to 5*l.* in tort, the plaintiff should have no costs; and it should not be necessary for the

SSWELL, J.—I am of the same opinion. We have no of inquiring here why the Legislature have legislated as ave done in the 119th and 120th sections; but have only to what is there clearly said. It is perfectly plain that under 9th section the defendant is entitled to have a suggestion l, and it must be entered accordingly; for there appears no why the 120th section should be preferred to the others.

LIAMS, J.—I also am of the same opinion. We are d to act on the 119th section; but it is said that section has peeled. That is not necessarily so. We cannot take the berty of construction in case of a statute like this as we th inconsistent and doubtful clauses in a will; this suggestion herefore go.

FOURD, J. concurred.

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*Rule absolute.*

April 22, 1853.

DRAKEFORD v. WALLER.

*Sale of goods—Title of vendor.*

*Goods of a deceased husband remained in the wife's possession, who was not his executrix, nor ever took out letters of administration. The wife married again, and while living with the man sold the goods to the defendant, and with the wife's knowledge, who apparently concurred in the sale the man was convicted of bigamy, he having at the time he married the plaintiff, of which the plaintiff was ignorant. The plaintiff then sued the defendant for the price of the goods. Held, that she was not entitled to recover.*

**T**HIS was an appeal from the decision of the County Court of Cheshire.

The plaintiff was issued for the recovery of 21*l.* 5*s.* 6*d.* for goods and furniture, sold to the defendant.

It appeared that the plaintiff was a widow, and that the goods in question belonged to her deceased husband, and that they remained in her possession until the sale, she not having taken out letters of administration as the executrix of her deceased husband. Before the sale she married one Bamborough who at that time had been convicted of bigamy, of which fact the plaintiff was ignorant, and continued to live with him down to the time of the sale. While plaintiff and Bamborough were so living together as man and wife, Bamborough sold the goods in question to the defendant, and received the price.

not be taken to be at least a consenting party to the sale; and, if so, cannot recover the price from the defendant. Then again, her title to recover in this plaint is the same as it would be were it an action of trover for the goods. She would have no title against the legal representative of her deceased husband, although she could have a title against a wrong-doer. But the defendant is not a wrong-doer; he acquired title through a party put forward by the plaintiff as the owner of the goods.

*Miller, Serjt. contra.*—This sale was a contract between the defendant and a third person. The plaintiff was not a party to it. [LORD CAMPBELL, C. J.—The marriage being void, what the plaintiff did in the sale was *sui juris*.] Bamborough obtained possession of the goods by means of a felony; that gave him no title; he could pass no property to the defendant. [CROMPTON, J.—There was no felony as to these goods.]

LORD CAMPBELL, C. J.—It seems to me that the appellant is entitled to our judgment. The plaintiff does not show that she had any property in the goods. They came to her possession from her late husband; there was no absolute property in her. The defendant was not a wrong-doer, for, so far as he was concerned, the goods were sold to him with her concurrence. But even if the goods had been her property—if she, being a *feme sole*, represents Bamborough as having authority to sell, she constitutes him her agent, for that purpose, and she cannot now say that the goods were sold without her authority.

WIGHTMAN and CROMPTON, JJ. concurred.

*Judgment for the appellants.*

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*Sale of goods—  
Title of vendor.*

April 26, 1853.

BERKELEY v. ELDERKIN.

*Judgment—Action on.*

*An action cannot be maintained in the Superior Court upon a judgment of a County Court under the 9 &*

THIS was an action upon a judgment in the County Court of Northamptonshire, for a sum above obtained under the 9 & 10 Vict. c. 95. And the defendant demurred to.

*Field*, in support of the demurrer.—This act is not maintainable because the remedy upon a judgment in County Court is different from that in the Superior Courts. Under sect. 103 County Courts can only award *execution* against a debtor. And a judge may order a judgment debt to be paid by instalments. And upon an execution, the tools of trade to the value of 5*l.* cannot be taken: the power to imprison (sect. 99) is in the nature of a punishment for contempt in cases of fraud, &c. The imprisonment cannot exceed forty days; and, by sect. 103, is not to be a satisfaction or extinguishment of the debt or cause of action. If an action in the Superior Court on a judgment of a County Court is held maintainable, the above provisions

*Millward*, contra.—This action is maintainable on which the action is founded is, that where a court of jurisdiction has adjudicated a certain sum to be due from one person to another, a legal obligation arises upon which an action of debt to enforce the judgment may be maintained. (*Williams v. Jones*, 12 M. & W.



to rescind or alter any order previously made against  
 ant, and to make any further order. So that it is clear  
 ent in the County Court is not a final judgment.  
 N, J.—Suppose you recover judgment in this action,  
 ie judge of the County Court summons the defendant,  
 an order to pay by instalments, what would be the  
 e?] I submit the power of the judge of the County  
 ld cease upon the judgment in this court being entered

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 Action upon,  
 not  
 maintainable.

AMPBELL, C. J., said, he was of opinion that an action  
 maintainable in the Superior Courts upon a judgment  
 in the County Court. *Primâ facie*, an action could be  
 in the Superior Courts on a judgment recovered in any  
 competent jurisdiction; but an examination of the County  
 (9 & 10 Vict. c. 95) showed that parties who recovered  
 in those courts were confined to the specific remedies  
 in that act. The intention of the Legislature was to  
 es for obtaining the payment of debts, and it pointed  
 inner in which judgments were to be enforced; but that  
 could be defeated if an action could be brought on a  
 of the County Court in the courts of Westminster Hall.  
 inted out a specific remedy against the person and pro-  
 e debtor. It protected his wearing apparel and bedding,  
 e tools and implements of his trade, to the value of 5*l* :

But if an action would lie in these courts upon a judg-  
 e County Court, a *fi. fa.* might issue against the goods  
 tor, under which the tools and implements of his trade  
 aken, and thus he might be deprived of the means of  
 a daily bread. The act also contained a provision for  
 ion of the debtor's person; he could only be committed  
 a cases of fraud, &c. and then only for forty days,—the  
 ent not being in the nature of an execution against the  
 as a punishment for contempt of court. But, if this  
 the Superior Court could be sustained, he might be  
 execution the same as if the action had been brought  
 n the Superior Court. As the act has given the plain-  
 ights with new remedies, he (Lord Campbell) was of  
 at the parties were confined to those remedies. The  
 on of the act showed that the judgment of the County  
 not final; and it was only on a final judgment that an  
 Superior Court could be brought. The County Court,  
 ent, had still the jurisdiction to remedy any grievance,  
 edy the manner in which execution should take place  
 gment. The judge might rescind or alter an order pre-  
 de as to the payment of a debt by instalments or other-  
 might make a fresh order for the payment of the debt,  
 nd costs forthwith, or by instalments, or in any other  
 such judge might think reasonable; and if judgment  
 ned in the Superior Courts, in an action brought upon  
 ent in the County Court, the judge of the County

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COURT OF EXCHEQUER.

*November 16 and December 8, 1853*

AUSTIN v. MILLS.

*Cause of action—County Court judgment—A  
An action is not maintainable in a Superior Court upon  
a County Court, established under 9 & 10 Vict. c.  
same cause of action for which the plaintiff in the County*

**T**HIS was an action of *assumpsit*. The first declaration was on a judgment obtained by the plaintiff against the defendant, in an action in the County Court of Durham, in which a verdict had been recovered for the plaintiff. There was besides a count for money lent, and received, being the same cause of action for which the first declaration was originally issued in the County Court. To the second declaration the defendant demurred; and to the second he pleaded that the causes of action were the same as those in the first, in which the plaintiff had recovered judgment in the County Court.

was admitted that the principle upon which that case was decided is new; and the reasons given in the judgment of Lord Campbell, if carefully considered, will be found to supply arguments in favour of allowing actions to be brought on these judgments, for it may be that such a course is the only available remedy remaining to the judgment creditor. An action would lie on the judgment of the old County Court. *Williams v. Jones*, 3 M. & W. 628), and the provisions of 9 & 10 Vict. c. 95, do not oust the jurisdiction of the Superior Courts; and an action will still lie on a County Court judgment in the Superior Courts. When it is said "the judgment of the County Court cannot be regarded as final, for the judge may alter or rescind it as he thinks fit:" (sect. 100.) That section is, in truth, to hasten the judgment and execution; and it cannot be assumed that the judgment here has been altered; and if it had been, it ought to have been pleaded *purs darrein continuance*, or by way of *audita querela*. Then, as to the second point, it is not contended that the judgment of an inferior court does not extinguish an ordinary debt; and in ordinary cases, you can sue on the judgment of the court of record; and the proceedings may be reviewed by error against the judgment of the County Court established under 9 & 10 Vict. c. 95, there is no error; and it is contended no action lies upon such judgment. Usually there is no action on the original subject-matter, because you have your higher remedy, and your action on the judgment. It is not clear that these courts record their judgments in the same formal manner as a court of record; and Baron Parke expresses an opinion that it is not so clear that these were intended to be courts of record for all purposes: (*Breese v. Owens*, 6 Exch. 413.) [ALDERSON, B. Suppose the County Court Act had expressly said you cannot maintain an action on a judgment, would you then have contended that an action would lie on the original contract?—Unless the judgment is final, it is no bar to an action on the original subject-matter; and the 100th section, which gives power to the judge to amend and vary the judgment, shows that it is not final. [PARKE, B. If the judgment is not final, it cannot be pleaded.] Whatever may be the determination of the court the plaintiff is entitled to judgment on one of the points. He cited Com. Dig. tit. "County," D, c. 13; *Level v. Hall*, Cro. Jac. 284; *Plummer v. Woodburn*, 1 B. & C. 625; *Fry v. Malcolm*, 4 Taunt. 705; *Biddle v. Dowse*, 1 B. & C. 255; *Carpenter v. Thornton*, 3 B. & Ald. 52.

*Mr. Jones*, for the defendant.—This court will not reconsider the judgment of the Queen's Bench.—[POLLOCK, C.B.—If we entertain doubts, we may send the case up to error with our opinions expressed, otherwise it would go up to error with the additional authority of our acquiescence.] The main ground for the decision in *Berkeley v. Elderkin* is, that it was never intended by the Legislature that an action should be maintained on a County Court judgment contrary to the scope and principle of the act. If the judgment in that case is correct, on the ground that it would be

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and the defendant would have no remedy or availing himself of his liability for costs. The defendant's judgment on both demurrers.

*Unthank* in reply.—This court may review the judgment of the Queen's Bench, and give their opinion on the final judgment. I desire to have the opinion of the court on the question whether it is not a final judgment, and upon that the judgments of Campbell and Crompton, J., were founded. They may be altered. [POLLOCK, C. B.—Not all the judgments made in which the sum recovered is to be paid. The judgment *quod recuperet*, and then an order of execution for the whole is but one order, and the words "final judgment" used in section 89, mean final and conclusive only. Court.

POLLOCK, C.B.—This was an action of assumpsit on a County Court judgment, with a second count upon a new action; and to the first count there was a demurrer, and to the second a plea of judgment recovered on proceedings in the County Court, to which plea there was a demurrer. I have given my judgment of the court; and two questions appear for consideration in the proceedings. The first is, whether an action may be brought in the Superior Courts on a judgment obtained in a County Court; second, whether such a judgment may be pleaded in bar of a new action for the original debt, for which the judgment was given. As to the first question, the court has already intimated its opinion. It should consider the case in the Court of Queen's Bench, *Elderkin*, 1 E. & B. 805 (*ante*, p. 116), and which is cited as an authority on which they ought to act in the first instance. It appears to be clearly their duty to take a different view of the matter, inasmuch as it comes to by the argument of the plaintiff.

Court of Queen's Bench or our own acquiescence in it on the present occasion. The second point is this:—it was contended that the judgment in the County Court was no bar to an action on the original consideration. It was not disputed that a final judgment in an inferior court for any cause of action was a bar to it in any other court for the same cause of action; but it was said that the judgment of the County Court was not final, and therefore no bar to such a suit, because it was competent to the County Court judge to vary it afterwards, by virtue of the 92nd and 100th sections. Expressions at the close of Lord Campbell's judgment, in 1 E. & B. 805, to that effect, were made use of in the argument before us, to show that the Chief Justice was of that opinion. But we think that the expressions of Lord Campbell have been mistaken; we do not understand his lordship to mean that the judgment was not final, in the sense that it was in the case of an interlocutory judgment. We think it is a final and complete decision of the case to the extent of the amount of debt between the parties. In the County Court the decision as to the amount cannot be altered; it ought not therefore to be brought into dispute by an action upon the original consideration, leaving it to a jury possibly to come to a different conclusion from which has already been pronounced by a court of competent jurisdiction. Consequently we think the same question, whether the debt recovered was due, ought not and cannot be again raised in any other court. The power of the County Court judge is not to vary the amount at all; the judgment, that part of it *quod recuperet*, is pronounced, and finally pronounced. All that the County Court judge can do is, to regulate the execution that may issue on the judgment. The judgment appears to be final and complete, and by no means in the nature of an interlocutory judgment; and it is therefore, in our opinion, a bar to an action on the same subject-matter in any other court. We therefore think the judgment on the whole record must be for the defendant.

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of action.*

*Judgment for the defendant. (a)*

(a) See *Berkeley v. Elderkin*, ante, p. 116.

April 22 and May 4, 1853.

THOMAS, App., STEPHENSON, Res

*Weights and measures—Scales—5 & 6 Will.*

*By the 5 & 6 Will. 4, c. 63 (relating to weights and measures) an inspector may enter any shop and examine all the steelyards, or other weighing machines; and if they are unjust, the same shall be liable to seizure, and if they are found to be so, they shall forfeit, &c.; and any person who has in his possession an incorrect or unjust steelyard machine shall be liable to a like penalty.*

*By section 39 all actions for anything done in pursuance of the act, shall be brought in the county in which the action arises; and the defendant may plead the statute in bar of the action, and that the act was done in pursuance or by authority of this act; and if they shall be so done, &c. then the jury shall find for the defendant.*

*By section 40 no plaintiff shall recover for any injury done by the act, or other wrongful proceeding made or committed in pursuance of this act, if tender of sufficient amends shall be made, &c.:*

*Held, that the inspector was not justified in seizing scales, and that his acting under the bonâ fide belief that he was doing so by the act did not entitle him to the verdict under section 39.*

**A** PPEAL from the County Court of Windsor. This was an action for seizing and taking scales of the plaintiff by the defendant, and converting them to his own use.

The plaintiff was a mealman at Eton, and the defendant was a scales dealer at Windsor.

*bonâ fide* belief that he was acting by the authority of Will. 4, c. 63. The judge of the County Court ruled defendant had no authority to take away the scales under the statute, and that his acting under the *bonâ fide* belief as authorised to do so did not entitle him to a verdict; judgment for the plaintiff, damages 2*l.* 5*s.*, the value of

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measures—  
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c. 63.

ell (*D. Power* with him), for the appellant.—By the ll. 4, c. 63, s. 28, it is lawful for any inspector authorised under the hand of any justice, &c. at all seasonable nter any shop, &c. within his jurisdiction, wherein goods xposed for sale, &c. and there to examine all weights, steelyards, or other weighing machines, &c.; and if a examination it shall appear that the said weights or are light or other otherwise unjust, the same shall be be seized and forfeited; and the person in whose the same shall be found, shall, on conviction, forfeit, &c. person who shall have in his or her possession a steelyard weighing machine which shall be found incorrect or unjust, &c. shall be liable to a like penalty." [LORD L, C. J.—Surely it cannot be contended that this section power to seize and take away scales.] Then, secondly, tant, being a public officer, and having acted under the belief that he was authorised by the act to take away les, is entitled to the protection of sections 39, 40. By ), in all actions for anything done in pursuance of this he execution of the powers or authorities thereof, the may plead the general issue, and give in evidence that ere done in pursuance or by the authority of this act; ey shall appear to have been so done, &c. then the jury for the defendant. By section 40, no plaintiff shall r any irregularity, trespass, or other wrongful proceeding mitted in the execution of this act, if tender or suffi- ds shall have been made by the party who shall commit

[LORD CAMPBELL, C. J.—The defendant refused to he scales; that cannot be in pursuance of the act.] In *Fooday*, 9 M. & W. 736, commissioners empowered to hes, &c. to be opened, enlarged, &c. took the plaintiff's ut his consent, for the purpose of widening the ditch, g no power to take land for that purpose; yet it was the defendant might tender amends for such wrongful ere the defendant might have tendered amends; and if led to the protection of section 40, he is also entitled to tion of section 39, as both are founded on the same l if acting *bonâ fide* gives him the protection of the one must of the other also.

for the respondent.—Without the act done is an act ursuance or execution of the statute, sect. 39 does not defendant to the verdict. It is clear the defendant was ized to seize the scales, and the act does not give a

LORD CAMPBELL, C. J.—This was an appeal from the County Court judge of the county of B. It was brought by a shopkeeper against the inspectors for seizing some scales that were unjust. On the day we intimated a clear opinion that the defendant was justified by the 5 & 6 Will. 4, c. 63, s. 28, in taking the plaintiff's scales as forfeited, although the plaintiff incurred a penalty; but we took time to consider the finding that the defendant acted *bonâ fide*, or that he was acting in pursuance, and by the statute entitled him to a verdict. It is impossible to lay any certain rule applicable to all the various cases of the protection of public functionaries who may be entrusted with the exercise of a statutable authority, honestly and in good faith, are justified or that they might be exempt from liability. It seems more reasonable, and more in conformity with the policy hitherto pursued by the Legislature, to hold that public functionaries intended wholly to free them from technical difficulties in their defence, and to exempt them from the consequences of a verdict against them if they are not guilty. The second question in the case depends on an examination of sections 39 and 40 of the 5 & 6 Will. 4. Looking only to the first of these two sections, there is some ground for contending that if the grievance appeared to have been done in pursuance of the act, a verdict for the defendant, although not done in pursuance of the act, and although there has been no payment of money into court; but the result, we think, shows satisfactorily that the act was o



h the jury may think an adequate compensation for the wrong. Although there is some change of phraseology in this on, as the expression occurs, "in the execution of the act," ad of "in pursuance of this act," it seems clearly to extend regularities where the party *bond fide* believed that in what he e was justified by the act. That being so, it is impossible to ive that the Legislature intended, where such irregularities occurred, to entitle the defendant to a verdict, on simply ng that what he did without the authority of the act, he did rsuance of it, and in the belief that, under the statute, he was ied in doing it. We are therefore of opinion that the County t judge was right in his decision on both questions, and that ppeal must be dismissed, with costs.

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—  
*Weights and  
measures—  
Scales—*  
5 & 6 Will. 4,  
c. 63.

*Appeal dismissed.*

## COURT OF EXCHEQUER.

*May 4 and 7, 1853.*

BUGGE, Appellant, and MAWBY, Respondent.

*ress for rent—Abandonment by landlord—Right to distrain again.  
re a landlord has distrained for rent and has a fair opportunity of  
rking out the payment of the rent by a first distress, if he abandon  
ch distress he cannot distrain again.  
re therefore a tenant before distress had committed an act of bank-  
ptcy, and, after advertisement of the goods for sale under the  
stress, the petitioning creditor had served a notice on the auctioneer  
t to proceed with the sale, and the landlord had therefore abandoned  
s distress:  
i, that the landlord had no right to distrain a second time, and that  
could not recover for a pound-breach in respect of the second  
stress.*

RICHARD BUGGE, the appellant, brought an action against Thomas Mawby, the respondent, in the County Court of folk, holden at King's Lynn in the same county, to recover n him the sum of 29l. 9s. and the judge of the said court ing decided and determined the said action in favour of the ondent, and the appellant being dissatisfied with the said

|                          |     |     |     |     |     |     |
|--------------------------|-----|-----|-----|-----|-----|-----|
| rupt                     | ... | ... | ... | ... | ... | ... |
| To cash paid rent-charge | ... | ... | ... | ... | ... | ... |

The action came on to be tried on the 15th Dec: the following facts were proved or admitted :—

Robert Atmore, mentioned in the particu became, on the 5th April, 1847, tenant from ye to determination at the end of any year, by a to the appellant, Richard Bugge) of a mill, cott acres of land, at the yearly rent of 50*l.*, payabl the 10th October, the 5th January, and the year, under and by virtue of a certain agreement the 23rd March, 1847), and made between the first part, the said Robert Atmore of the sec said Robert Atmore and John Atmore of the th

Robert Atmore was also tenant under parol ag appellant of another piece of land containing ab the yearly rent of 6*l.*, so that the total yearl payable to the appellant by Robert Atmore woul

Robert Atmore continued, from the time of r ment, in occupation of the premises as tenant to the 6th August last, when he clandestinely quitt of the said cottage, mill, and land, and fled fr thereby committed an act of bankruptcy.

No notice had been given to determine the te cottage, mill, and lands under the said agreement

Atmore at the time of his flight, had a ms name of Crisp, who lived in a cottage, part premises, adjoining the mill. About the 9th appellant heard of his tenant's flight, and went

Atmore's return, and he went to see that the property was taken care of. During the month of September last, substantial repairs, at a cost of 70*l.* were done to the mill, under the direction of the appellant. The appellant acted under the advice of his solicitor, who recommended him not to take possession of the premises. The appellant and his solicitor agreed to let the premises from the 13th October 1852, to one Frost, as tenant from year to year conditionally, the condition being for the relinquishment of the tenancy by Frost upon any claim being made to it.

Atmore, or any one claiming through or under him; and Frost then entered upon the premises in pursuance of such agreement. The respondent, as assignee under a fiat in bankruptcy subsequently issued against Atmore, let the reddish of the land to Frost. All rent up to Lady-day 1852 has been paid. The appellant, previously to the 13th October, had paid the sum of 9*s.* for tithe rent-charge of the said premises payable on the 1st October. For the sum of 28*l.*, being the amount of half-year's rent up to the 11th October the appellant, on the 12th October 1852, distrained certain goods and chattels then being in and upon the said mill, cottage, and lands, and kept possession of the same in distress till the 18th October, when the goods and chattels distrained were advertised for sale, and were then about to be sold at auction by one Bell Daws, an auctioneer, on the appellant's behalf. On the same day, a notice in writing, signed by the respondent, was served upon the said Bell Daws, and was by him communicated to the appellant, which notice was in the words and to the effect following:—

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“ The Bankrupt Law Consolidation Act 1849.

“ In the Court of Bankruptcy.

“ In the matter of Robert Atmore, late of Gaywood, in the county of Norfolk, miller.

“ Take notice that a petition for adjudication of bankruptcy was, on the 16th October instant, filed in the Court of Bankruptcy, London, against the above-named Robert Atmore, by me the undersigned Thomas Mawby, of Gaywood, in the county of Norfolk farmer, one of the creditors of the said Robert Atmore (the said Robert Atmore having in the month of August last recorded from his creditors); and that it is the intention of me, the said Thomas Mawby, forthwith to proceed in the matter of the said petition. This is therefore to require you not to sell or otherwise dispose of the goods, chattels, and effects now being in and about the premises, lately in the occupation of the said Robert Atmore, at Gaywood, aforesaid, or any of them; and which goods, chattels and effects advertised for sale by you this day, are now or only were the property of, or in the possession of, the said Robert Atmore.

“ And take further notice that in the event of your selling, or otherwise disposing of, the said goods, chattels, and effects, or any

satisfied by the said distress.

On the 23rd October 1852 the said Robert declared a bankrupt upon a petition for adjudication presented by the respondent on the 16th October year; and on the 10th November following the appointed the creditors' assignee of his estate and a messenger of the Court of Bankruptcy took the goods and chattels of the said Robert Atmore, with the said mill, cottage and lands.

On the 16th November 1852 the respondent told the plaintiff that the said arrears of rent and should be paid on the day after the goods and chattels of Robert Atmore should be sold.

On the same 16th November the said sums of money being still unpaid to the appellant, the appellant, the payment of the same, again seized and distrained the goods and chattels then being in and upon the said land for the said rent and tithe rent-charge so due as aforesaid, of which second distress the respondent that it was made, had notice.

On the 17th November the said goods and chattels distrained by the appellant, as last aforesaid, were about to be sold by auction by the said Bell Daws and by the authority of the respondent. Whereupon any sale thereof, and whilst the appellant still held the said goods and chattels so seized and distrained as aforesaid, the appellant's solicitors, on his behalf, said Bell Daws and the respondent the following signed by the appellant's said solicitor:—

“To Mr. Bell Daws, to the messenger in presence of  
Thomas Mawbey, assignee or reputed assignee

said Richard Bugge, for half-year's rent in respect of the said nises, up to Michaelmas-day last.—Witness my hand this 15th ember, 1852.

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he said Bell Daws (by direction of the respondent), notwithstanding the said last-mentioned distress (and in defiance of the est of the bailiff of the appellant, who had made the distress he 17th November), sold all the said goods and chattels so ained by the appellant as last aforesaid, and paid over to the ondent the proceeds thereof, being upwards of 30*l.*, after icting the expense of the sale. The said Bell Daws, nor the ondent have ever paid to the appellant the said sum of 28*l.* 1*l.* 9*s.* so respectively due to him for rent and tithe rent-ge as aforesaid, or either of them.

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pon the above statement of facts, the appellant contended that as entitled to the judgment of the court upon three grounds. t, that the second distress made on the 16th November, 1852, a legal distress, and available for the said arrear of rent due to ppellant (the same being less than a year's rent), and that the ondent, having caused the goods and chattels then distrained in the possession of the appellant to be sold, and having ved the proceeds of such sale after he had notice of such id distress and of the appellant's claim for rent, was legally e to pay the appellant the amount so due to him for rent as said. Secondly, that the respondent was liable to pay the sums so due to the appellant for rent and tithe rent-charge as said, under and by virtue of his promise made to the plaintiff e 16th November last; and, thirdly, that under and by virtue e acts of Parliament now in force concerning bankrupts, the llant was entitled to recover the said half-year's rent and tithe -charge.

he judge decided, first, that the second distress, made on the November, 1852, was illegal; and that therefore the appellant not entitled to recover upon the first ground, upon which he ended that he was entitled to the judgment of the court. ndly, that the respondent's promise of the 16th November, l, not being in writing, was not binding upon the respondent, that the appellant was not entitled to recover upon the second nd upon which he contended that he was entitled to the judg- t of the court. And the judge accordingly determined the action in the respondent's favour. The judge did not notice is judgment the third point urged on behalf of the appellant. judge also held that there was no eviction of Robert Atmore he appellant from the premises, or any part of them.

he question for the opinion of the court is whether, under the e statement of facts, the appellant is entitled to recover from respondent the said sums of 28*l.* and 1*l.* 9*s.*, or either of them. he court is of opinion that he is so entitled, the judgment is to ntered for the appellant accordingly; otherwise the judgment he court below is to be affirmed.

*Ravenor*, 3 Bro. & Bing. 662; *Dawson v. Cross*, defendant was liable to pay under his parol pro plaintiff on the 16th November. Although the rupt, the money realised was available to s (12 & 13 Vict. c. 106, s. 129.)

PARKE, B.—Can you recover in the County claim for rent that which is in reality a pound-br

POLLOCK, C. B.—That is not a point submit was no objection to form in the court below.

PARKE, B.—With respect to the first point, opinion, although the cases require consideration wrong in relinquishing possession of the first d you make out that because the defendant has that he is therefore liable for rent?

*Cleasby*, for the respondent, the defendant below upon.

PARKE, B., after going through the case.— statement of facts, the appellant contended that the judgment of the court upon three grounds: second distress, made on the 16th November, 1 distress, and available for the same arrear of rent lant (the same being less than a year's rent), and dent having caused the goods and chattels then the possession of the appellant, to be sold, and his proceeds of such sale after he had notice of such and of the appellant's claim for rent, was legally appellant the amount so due to him for rent as afo that the respondent was liable to pay the said s appellant for rent and tithe rent-charge as afores virtue of his promise made to the plaintiff on th

ill certain creditors on the part of the bankrupt should take session of it. The learned judge found as a matter of fact that there was no eviction; therefore we cannot treat it as an action. On the first question, the jury found the second distress was made, and therefore the appellant was not entitled to recover. We are of opinion in the first place, that, if we look to the form of it, the plaintiff really has not shaped his case as he ought to have done; for his claim in this case was not that the second distress was a legal distress, as it ought to have been, but his claim is for pound-breach. But without giving a judgment on that ground, as we are unwilling to hold the parties strictly to the forms of form in the County Court, we are of opinion that, on the merits, the learned judge decided the case rightly. The question is whether the second distress, which was made on the 16th of November, was a lawful distress. There is nothing more clear than that a person cannot twice distrain for the same goods; if he has an opportunity of levying the amount of the first distress, it is vexatious in him to levy the second, unless there be some legal ground for him to distrain a second time—as, for instance, in the case put by Lord Mansfield, in 3 Burr., if there has been some mistake as to the value of the goods, and he fairly supposed the first distress to be of the proper value at the first time it was taken, and found it to be insufficient, he then might distrain for the remainder; or if the tenant has done anything equivalent to saying "I will bear to distrain now, and postpone your distress to some other time," then he may make a distress a second time; but if there is no opportunity, and there is no lawful or legal cause why he should not work out the payment of the rent by reason of the first distress, it is his business to work it out by the first distress, and he cannot distrain again. It is not a question whether he might maintain an action for use and occupation; and many of the cases do apply to that. The levy by distress was not good, unless it was shown the distress formed a satisfaction. The principle on which a man cannot distrain twice is, that he must not twice vex a tenant by the exercise of this summary remedy: therefore the question in this case comes simply to this—whether the notice that was given by the petitioning creditor, who at the time had no interest whatever, and was only mentioned in the petition—whether a notice by him to the landlord to desist from selling on the first distress was a cause or excuse for his abstaining to exercise his power of distress. We are all of opinion that it was not; that it was a mere threat, an idle threat, which he might have disregarded, and ought to have disregarded; and it is wrong to say that this is done by the act of the defendant; for at the time the defendant, through his agent, made this statement that he would maintain an action for that seizure, he had no interest whatever in the subject-matter; he was not assignee. Therefore we consider it as a mere idle threat from a stranger, who had no power to interfere with the distress, and the landlord ought to have gone on and distrained; and if he had done so, he would have worked out

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County Court is affirmed with costs.

*Judge*

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COURT OF QUEEN'S BENCH

May 9, 1853.

REG. v. DOWLING.

*Insolvent—Rehearing—Warrant.*

*When an order for rehearing of an insolvent's petition is made by the County Court, and the insolvent neglects to attend the hearing, a warrant for his apprehension may be issued by the County Court under the 1 & 2 Vict. c. 110, s. 96, and c. 102, s. 10.*

A RULE nisi was obtained on a former day for the judge of the County Court at York, to issue his warrant for the apprehension and commitment of William White, an insolvent debtor, pursuant to the 1 & 2 Vict. c. 110, s. 96.

It appeared that the insolvent's petition came before the judge of the County Court at York on the 4th day of May, 1853.



the said court according to such order for rehearing, it shall be lawful for the said court to order such prisoner to be apprehended and committed to custody in such prison as the court shall direct, and to issue its warrant accordingly, and to cause such prisoner to be brought up for examination as often as to the said court shall seem fit." The judge of the County Court, thinking that he had jurisdiction, declined to make such warrant.

*Drammell* and *C. Pollock* showed cause. — The order for the rehearing was made by the County Court judge on the authority of the case, *Ex parte Phillips, In re Clabburn*, 21 L. J. 379, Q. B. The point now to be determined is, what is the next step to be taken when the insolvent neglects to appear on the day fixed for rehearing. The 1 & 2 Vict. c. 110, s. 30, enacted, that three commissioners should make circuits; "and that, upon such prisoner's appearance before such commissioner on his circuit, it shall be lawful for such commissioner to make all such orders and to do all such directions, and to do all such matter and things requisite for the discharging or remanding of such prisoner and otherwise respecting such prisoner, and his schedule, his creditors, and assignees, as the said Court for the Relief of Insolvent Debtors might make, give, order, &c. Then the 10 & 11 Vict. c. 102, s. 10, defines the circuit of the commissioners, and gives the Insolvent Court power to refer the petition for hearing to the County Court, and enacts, "that any court to which any such petition shall be referred shall have and possess the same power and authority in respect to every such petition, and shall make all such orders, and do all such directions, and do all such matters and things requisite for the discharging or remanding of such prisoner, and otherwise respecting such prisoner, his schedule, creditors, and assignees, as the said Court for Relief of Insolvent Debtors or any commissioner thereof might make, give, or do, in the matters of petitions heard before such court or commissioner under such act." Now, supposing the insolvent to be without the jurisdiction of the County Court, to whom is the warrant for his apprehension to be addressed? It is submitted that the Insolvent Court is the proper court to issue its warrant under sect. 96 of 1 & 2 Vict. c. 110, and not the County Court. (The statute 1 Geo. 4, c. 119, and the rules of practice for County Courts, 125 to 129, were also read.)

*Griffiths*, in support of the rule. — In *Ex parte Phillips*, it was determined that the Insolvent Court has no power to make an order for the rehearing of a petition of the insolvent, which had been originally heard in the County Court, and therefore it is submitted that the County Court, having made such order for rehearing, is the proper court to issue the warrant for the apprehension of the prisoner if he neglects to appear on the rehearing. Section 10 of 10 & 11 Vict. c. 102, is amply sufficient to give them that power. The same power is given to the County Court as the Insolvent Court possesses, and the jurisdiction of the Insolvent Court extends over all England. The same difficulty arises on

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powers as are exercised by the Insolvent Court, the County Court has authority to do what is an exercise of such powers. It has power to issue its attendance of the insolvent at the rehearing of his so, such a warrant ought to issue. At present I whether such warrant can be executed out of the County Court. We should not grant a *mandamus* bring the judge into peril by issuing such warrant peril in granting the warrant, for it is a lawful warrant that warrant for the apprehension of the insolvent beyond the jurisdiction of the County Court, we called upon to determine.

The rest of the court concurring,

*Rule absolute to issue a warrant in the terms of*  
1 & 2 Vict. c. 110.

## COURT OF QUEEN'S BENCH.

*May 9, 1853.*

REG. v. HARDEN.

*Jurisdiction—Title—11 & 12 Vict. c. 123.*

*action may be maintained in the County Court to recover the expenses incurred by a public body in removing a nuisance by virtue of the 11 & 12 Vict. c. 123, s. 3 (The Nuisances Removal Act), against the owner of the premises, even though the ownership of the premises is disputed by the party from whom the expenses are claimed.*

RULE *nisi* was obtained on a former day for a *mandamus* to the judge of the County Court of Northwich, Cheshire, commanding him to issue execution for the payment of 18*l.* 15*s.* It appeared that the guardians of the Northwich Union had obtained an order of justices for the cleansing of a ditch, of which Holland was alleged to be the owner. Mr. Holland denying ownership and neglecting to cleanse the ditch, the guardians ordered it to be done; and the sum of 18*l.* 15*s.* was claimed as the expenses of such cleansing. The guardians proceeded under the Nuisances Removal Act (11 & 12 Vict. c. 123, s. 1) against Mr. Holland, as owner, by complaining before a justice, and obtained an order for cleansing the ditch. The justices declined to order Mr. Holland to pay these expenses, as he wholly denied being the owner of the ditch: (see sect. 3.) The guardians then sued Mr. Holland in the Northwich County Court for the expenses. The defendant, Mr. Holland, appeared, protesting against the jurisdiction of the County Court, as he disputed that he was the owner of the ditch, and so the title came in question within sect. 58 of 10 Vict. c. 95; but the case was tried before a jury, and they gave a verdict for the guardians for 18*l.* 15*s.* The judge, however, refused to issue execution or order payment, as he thought he had jurisdiction under the circumstances.

The following are the material parts of the 11 & 12 Vict. c. 123,

By sect. 3, such expenses "shall be deemed to be money lent for the use and at the request of the owner or occupier of the premises, in respect whereof such expenses shall have been incurred, and may be recovered as such by the guardians, in any County Court, Civil Bill Court, or (in Scotland) before the sheriff, the magistrate, or justices of the peace; or such guardians may,

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if they shall think fit, recover such expenses before two ju  
&c.

*Willes* and *Holland* showed cause, and *Pashley* supports  
rule.

LORD CAMPBELL, C. J.—I am of opinion, that, althoug  
question of title does arise, the 3rd section of 11 & 12 Vict.  
overrides the 58th sect. of 9 & 10 Vict. c. 95, and in expresse  
gives the County Court jurisdiction to determine who is the  
pier or owner of the premises, and to make an order upon  
the costs and expenses incurred by the guardians. If the ju  
the County Court has not jurisdiction, the 3rd section of  
would be inoperative, and there would be no mode of rec  
the money. The act gives a new power, and provides a  
for recovering the expenses, and that remedy may be pursue  
withstanding sect. 58 of 9 & 10 Vict. c. 95.

The rest of the court concurring,

*Rule abs*

## COURT OF QUEEN'S BENCH.

*May 24, 1853.*

DAVIES v. FLETCHER AND OTHERS.

*imprisonment—Commitment by County Court for not appearing pursuant to judgment summons under sections 98 and 99 of County Court Act—Arrest after payment of debt and costs to plaintiff.*

*Plaintiff, having obtained judgment in the County Court for debt and costs; upon failure of the defendant to pay, took out a judgment-summons under section 98 of 9 & 10 Vict. c. 95; which was personally served upon the defendant. He did not appear pursuant to that summons, and the County Court judge ordered him to be committed to prison for seven days, or until discharged by the due course of law. The clerk of the court made out the warrant, which was delivered to the bailiff, and the defendant was afterwards arrested under that warrant. Before the arrest, he had paid to the plaintiff the amount of debt and costs, and notice of that payment had been given by the plaintiff to the clerk of the court.*

*An action for false imprisonment against the clerk and bailiff of the court:*

*That the payment was no supersedeas of the warrant, and that the arrest under it was lawful.*

RESPASS for false imprisonment against the clerk and bailiffs of the Southwark County Court. At the trial before Coleridge, J., in Surrey, a verdict was entered for the defendants; but leave was given to the plaintiff to move to enter a verdict for him, with one farthing damages.

It appeared that the plaintiff had been sued by one Stretfield in the Southwark County Court for a debt, and that on the 1st of April, 1852, he obtained judgment for 1*l.* 15*s.* 9*d.* debt, and 4*d.* costs, to be paid to the clerk of the court, at his office, on or before the 8th April. The amount not being paid pursuant to

order, a judgment-summons was afterwards issued under section 98 of the County Court Act (9 & 10 Vict. c. 95), requiring the defendant (the present plaintiff) to appear on the 21st of June to answer questions touching his estate and effects, &c.; and upon return of that summons, the defendant not appearing, personal service of the summons was proved, and the judge then ordered the defendant to be committed to gaol for seven days, or until he should be discharged by due course of law. Under that order

reconnect the circumstance, and told the officers that their duty, he could not interfere. The letter being found, Fletcher then ordered the discharge of the party who brought this action for the imprisonment which was under the warrant. A rule having been obtained and verdict found for the defendant, and to enter it for

*M. Chambers* and *Lush* now showed cause.—First action was insufficient, for not specifying in which Court at Westminster the action was to be brought. Second defendants were completely justified. The warrant was under sections 98 and 99 of 9 & 10 Vict. c. 95; as to the judgment creditor was no supersedeas of the warrant issued to enforce a commitment for contempt of obtaining a discharge from imprisonment under the Act of preventing its execution, was to make an application to the court; and the defendant Fletcher had no authority to discharge. (They referred to section 110 of the Act of commitment for nonpayment only, the party must procure his discharge by paying the full amount but that rule has no application here.)

*Pearson*, contra.—This warrant was merely civil was superseded by payment, just as in the case of a writ to the sheriff. If this were not so, why should the costs be indorsed on the warrant? The payment is the substantial object of the proceeding; and that is the substance of such proceedings: (*Bonafous v. ...* 316; *Phelips v. Barrett*, 4 Price, 23; *Reg. v. The County Court of Surrey*, 21 L.J. 310, Q. B.; 1 Co.

LORD CAMPBELL, C. J.—I am of opinion that Coleridge properly directed a verdict for the defendant. By sect. 99 of the County Court Act it is

arrant founded upon it, having legally issued, remained in full force at the time of the arrest; and all that we have to determine is whether the arrest was lawful. The 133rd rule does not apply to a case of this sort, nor was any such payment made as that rule requires; but it is said that the payment to the party of itself vitiates the warrant. I am, however, of opinion that that is not so; the plaintiff's contempt was not purged by the mere payment of the money; he was lawfully imprisoned, and the only mode of procuring his discharge was under sect. 110 of the statute in the directions of which were not followed. It is indeed very doubtful whether the plaintiff was legally discharged at last; but all events the imprisonment whilst it lasted was lawful. None of the cases cited apply to this order, which is quite different from an order for the payment of money.

**JURIST, J.**—I am of the same opinion. The warrant was lawfully issued. At that time nothing had been paid; but before the warrant was issued Davies paid Stretfield, and Stretfield communicated that to the officers. Did that make the arrest by the officers unlawful? I think certainly not. The knowledge of Fletcher is not the knowledge of the officers; but, further than that, I think Fletcher had authority to order the plaintiff's discharge; and even if he had not, in his hand Stretfield's letter when the officers came to him, I think he would have been right in saying that he could not refuse. No statute or rule of court authorizes him to discharge a party under such circumstances; the discharge may be obtained by application to the court under s. 110, or by payment to the plaintiff under rule 133, when the commitment is for nonpayment; neither of these courses was pursued. It is said that the letter from the clerk of the payment was equivalent to an instruction to a sheriff's officer not to execute a *capias*; but I am of opinion that it is not; and that the clerk of the court is not required to enter into any consideration as to the genuineness of a letter. *R. v. The Clerk of the County Court of Surrey* was an entirely different case. There, part having been paid before execution, the court held that execution might go for the remainder; but here the question is, whether the officers were bound to take notice of a settlement between the parties behind their backs.

**PROMPTON and COLERIDGE, JJ.**, concurred.

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*False imprisonment—Arrest upon a judgment summons after payment of debt and costs.*

*Rule discharged.*

April 28, 1853.

REG. v. RAINES.

*Replevin—Title—Jurisdiction.*

*The County Court has jurisdiction to try a question of or incorporeal hereditaments in replevin, and such p cannot be removed from the County Court, except on the conditions in section 119, and the rules of practice*

UDALL, on a former day, obtained a rule nisi of judge of the County Court in the East Riding to hear and determine a plaint in replevin. It appeared the plaint was called on for hearing, the defendant's question of title was in dispute, and that the judge had jurisdiction to try it, and the judge yielded to the defendant. The defendant did not give a bond with two sureties to satisfy the rule, as required by the 9 & 10 Vict. c. 11. It was urged in support of the rule, that by section 119 replevin are to be brought in the County Court. By section 121 the action cannot be removed from the County Court unless the party who objects to the action being tried in the County Court, on the ground of the title being in dispute, shall become bound, with two sufficient sureties, by the clerk of the court, to prosecute the suit without delay. Rule 194 of the County Court Practice provides that all actions of replevin in cases of distress for rent shall be tried in a summary way, as other actions in the County Court under the 9 & 10 Vict. c. 95; and rule 197 provides that a plaint in replevin may be removed from the



usion; but it is now contended, on the other side, that ss. 119 and 121 operate as a partial repeal thereof in cases of replevin. If the court think so, the judge of the County Court is quite right that this rule should be made absolute.

*Dall*, in support of the rule, was not called upon.

ORD CAMPBELL, C.J.—It seems to me, taking the two propositions together, that the condition in section 121 must be complied with by the party objecting that title comes in question before the writ can be removed in replevin.

VIGHTMAN, ERLE, and CROMPTON, JJ., concurred.

*Rule absolute.*

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## COURT OF QUEEN'S BENCH.

*May 9th, 1853.*

MORRIS v. BOSWELL.

*Application for costs under the County Court Act—Within what time.*

*Plaintiff having recovered less than 20l. is not bound, in making an application for his costs, to come in the course of the next term after the verdict or award. And where, the action having been referred, the arbitrator made his award on the 9th June for a sum less than 20l., an application made on the 7th February in the following year: is not too late.*

THIS was a rule calling upon the defendant to show cause why he should not pay the plaintiff his costs of this action. The action was brought to recover more than 20l.; but, upon a reference, the arbitrator had awarded less than that sum. The award was made and published on the 9th June, 1852; and on the 7th of this year an application for costs was made by the plaintiff to a judge at chambers. That application was opposed on the ground that it was too late; and the case of *Orchard v. Mozhay* (L. T. 255; 16 Jur. 124; and n. to *Asplin v. Blackman*, 7 Ch. R. 387) was cited, upon the authority of which it was said that Alderson, B. had refused a similar application. The learned judge (Erle, J.) therefore declined to make the order, but referred the matter to the court. The present rule was consequently signed.

*Cush* showed cause.—This motion ought to be made within a

LORD CAMPBELL, C. J., now delivered the judgment of the court.—We took time to consider, to consult our brethren in the Court of Exchequer. We have consulted them and agree now that the application for costs under the Act does not come too late. When the application was refused by my brother Erle, he refused it on the authority of the decision of my brother Alderson in the Court of Exchequer that proceeded on a misconception of our decision in *Orchard v. Mozhay*, which merely went to this, that against a judge's order you must come in the next succeeding term, and did not at all apply to the original application should be made for costs. Baron Alderson having been misinformed with respect to the decision, all my brothers now agree that the application under such circumstances, come too late, and that it is not at all prejudiced. Therefore the rule will be a

[See next case.]

## COURT OF EXCHEQUER.

*May 6 and 9, 1853.*

REID v. GARDINER.

*Concurrent jurisdiction—Costs.*

*cause in which the Superior Courts had concurrent jurisdiction, was tried the 2nd February, 1852, and a verdict having been returned for the plaintiff, an application was made on the 26th January, 1853, to a judge at chambers, under 15 & 16 Vict. c. 54, s. 4, for an order for the plaintiff's costs. The judge dismissed the summons; and on the 1st of April the plaintiff obtained this rule: that the application was made in time.*

DW. JAMES showed cause against a rule calling on the defendant to show cause why the bill of costs of the plaintiff should not be taxed and paid. The cause was tried on the 2nd February, 1852, before the judge of the Passage Court at Liverpool. The claim was for 12*l.*, and a verdict passed for the plaintiff for 2*l.*; and no application had been made to tax the costs of a summons was taken out on the 26th January, 1853. This summons the learned judge (Alderson, B.) had dismissed. The question was whether such an application must not be made within a reasonable time, and, if that were so, was a year, during which the plaintiff had laid by, a reasonable time? The plaintiff said the defendant had been out of the country; but that was immaterial, since personal service of the summons was not necessary. The cause was at issue on the 24th November, and ought have been tried on the 11th December; but it was not tried until the 2nd of February following, at which time the defendant was out of the country. The case of *Orchard v. Moxhay*, 16 Jur. 411, is a decision against this application. Here the plaintiff comes to the court to review the decision of a judge; there has been an unreasonable lapse of time, and the defendant's position might be such delay be materially altered.

*Milward, contra.*—The case of *Orchard v. Moxhay*, was not produced at chambers, but an article written on it, and that case was decided prior to *Aspin v. Blackman*, 7 Ex. 386. He also

had concurrent jurisdiction. The whole cause of  
at sea, beyond the mouth of the Liverpool river,  
out of the jurisdiction of the County Court. It is  
in which the plaintiff was entitled to his costs unde  
the County Court Act relating to concurrent juris  
the judge was satisfied there was concurrent juris  
bound to make the order for costs; but it was on  
ground that the application came too late. Mr. I  
felt himself bound at the time by the decision that  
16 Jur. 124, and in a note in 7 Exch. 387; and in  
appeal from the order, the court held the applic  
made in reasonable time—that is quite right; *this* i  
from an order; it is an application by the plaintiff t  
preliminary to getting his costs taxed. We con  
Queen's Bench in this, that it is in the plaintiff's  
although he may wait for eleven months, or lon  
mercy to the defendant; it is not then too late fo  
make the order under the last County Court Act, i  
that it was a case of concurrent jurisdiction; the  
case the rule must be made absolute.

## COURT OF COMMON PLEAS.

January 21, 1853.

TAYLOR v. ADDYMAN.

*Jurisdiction in detinue—9 & 10 Vict. c. 95—Extension Act,  
13 & 14 Vict. c. 61.*

*County Courts retain the jurisdiction of the old County Courts to try actions of detinue, with this difference that the amount is extended to 50*l*.; but if, in the course of the trial, it should appear that the chattels are worth more than 50*l*., the jurisdiction of the court is ousted, as in cases where title to realty is concerned.*

**HIS** was an action of detinue in the County Court of Yorkshire, brought, as stated in the particulars of demand, "to recover one petty cash-book, one receipt-book, one collecting book, account-book, and the several other books, accounts, and documents, of the value of 50*l*., the property of the plaintiff, and which you the defendant unlawfully detain from him; and take notice that you are required to produce upon the trial of the said action, all the said books," &c. In the summons served on the defendant the particulars of claim were stated to be "debt or damages, 50*l*." It was objected for the defendant at the trial, that the action being substantially an action of detinue, the court had no jurisdiction to try it. The judge thereupon said he would alter the particulars of demand, and change the form of action, which he accordingly did, by striking out the words "unlawfully detain from him," and inserting in lieu thereof the words "refuse to give to the plaintiff, and have converted to your own use, whereby the plaintiff has sustained damages to the amount of 50*l*." It was then objected for the defendant that the judge had no power to make such an amendment. The cause was tried by a jury, and a verdict taken, under direction of the judge, for 50*l*. debt, and 9*s*. 2*d*. costs, which were ordered to be paid on or before 3rd December last. The order contained an indorsement that execution was to be suspended on the books being given up and the costs paid. A stipulation was made *ex parte*, on behalf of the defendant, to Martin, B. for a prohibition, who ordered the writ to go, expressly to raise this question, whether the County Court has jurisdiction in actions of detinue.

**Templey** now moved for a rule to rescind the order of Martin, B.

**COL. II.**

**L**

9 & 10 VICT. C. 93, as one act); 10r, speaking of taken by barristers, attorneys, &c., it regulates the amount of "the debt, damage, or demand claim in covenant, debt, detinue, or *assumpsit*," "within given by that act." Section 11 of the same act de of costs who sues in the Superior Courts and re exceeding 20*l.* in covenant, debt, detinue, or *assump* it would follow that, if the County Court has n detinue, a plaintiff could not any where recover should not get a verdict for more than 20*l.*), exce of losing his costs. This would be an obvious i such, not contemplated by the statute. The actio not always terminate by judgment for the specific result in damages for that detention and costs: (*W* 5 C. B. 318; *Jones v. Dowle*, 9 M. & W. 19.) In th held that detinue was maintainable even though the verted before action. There might be judgment alone, and not for the goods. [JERVIS, C. J.—V tender of the goods can you take damages alone authority of *Phillips v. Jones*, 19 L. J. 374, Q. I *Such*, 20 L. T. Rep. 141; *Henry v. Earle*, 8 M. the other side it may, perhaps, be contended tha County Court to have had jurisdiction in detir jurisdiction was ousted by the changing of the act from detinue into trover. [MAULE, J.—That Can the judge alter any action in which he has Another question arises—Could the parties have c alteration? [MAULE, J.—The answer is, they o judge had no power; and if that be so, the pe could have no power to change the form of act question of amendment, there was a case in the Qr

; that can be said by the other side is, that the County Court Extension Act mentions actions of detinue. Whoever drew the 9th and 11th sections of that act seemed to think that the jurisdiction of these courts extended to actions of detinue; but the courts themselves give no such jurisdiction, and it cannot by legislation be extended. [MAULE, J., referring to sect. 58 of 10 Vict. c. 95, asked whether, in the present case, any debt or damage was claimed above 20*l*.] There is here no debt or damage claimed. [WILLIAMS, J.—The object of the plaint is the value of the goods.] No. The object of the plaint is the article itself. Detinue cannot lie in the County Court unless power be given to the court by express words; which is not the case here. Where a plaintiff brings detinue for goods, value 50*l*, the action may in any case be for articles worth more than 50*l*; and the judgment will be for the goods, and is conclusive as regards the property. [JERVIS, C. J.—The form of the writ of execution in detinue is such that the defendant has an option to deliver the goods in value or pay the value. If he will not give up the goods, or they cannot be had, then, if offered, the sheriff must take the value, and the goods.] The provisions of the act should be considered to see whether they are applicable to detinue or not. It is submitted that they are not. In debt jurisdiction attaches by sect. 63 where the excess is abandoned; but not so in detinue. What is the excess to be remitted in detinue? Is the plaintiff to give up some of the articles, or a portion of their value? [MAULE, J.—Where there are three articles of the value 50*l* each, why may not the plaintiff abandon one of them?] No. [The Extension Act enlarge the 9 & 10 Vict. c. 95, in regard?] It does not; it only extends the jurisdiction as to the amount, and not to the causes or forms of action. [JERVIS, C. J.—You say the words “any debt or damage” do not extend to detinue.] Yes. [MAULE, J.—Does defendant, in his affidavit, state that the goods were of greater value than 50*l*.?] He says they were worth more to him. [MAULE, J.—But that is not sufficient.] Take the case of a title-deed,—what is that worth to the plaintiff who takes it? The defendant here called on the judge to ascertain the value of the articles. Then, as to the 58th section, it does not in terms include detinue. The power of execution rests wholly on the 94th section, which empowers the court to grant execution against the goods, and it is applicable only to an action for the payment of money. There is no means provided by the act for an execution in the case of a detention of goods. Not only is there no power in the court to try an action of detinue by judgment; but it can only be on such consent. [WILLIAMS, J.—The question is, whether the judge had jurisdiction to try the case and give this judgment.] It is whether he had jurisdiction to try the cause at all. [MAULE, J.—Is it not, after all, notwithstanding the amendment, as much as ever a count in detinue?] If it continues a count in detinue, then it is a count for more than 50*l*, and jurisdiction is therefore ousted. Looking at the nature

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(9 & 10 Vict. c. 95) must be read in connexion as if both were passed at once. It may well be the opinion put upon the first act by Mr. Hall is correct, "demand" in the 3rd section of that act extends to debt, damage or demand, where a sum certain recovered. If that be so, then we must look beyond—we must regard the 6th and 11th sections of c. 61, as if they belonged to the 9 & 10 Vict. c. 11th section is strong: it says, that if in an action brought in the Superior Courts, the plaintiff recovers exceeding 20*l.*, he is to have no costs; the consequence would be, that if the County Court has not jurisdiction of detinue, in every action of detinue where the value is under 20*l.*, no action would practically be maintainable, as the plaintiff could not recover in the Superior Court without the hazard of losing costs. The words "debt, detinue or damage" were introduced into that section by a subsequent act, in consequence of general experience, and with the view of making it plain that the County Court was to have jurisdiction in detinue. When the statutes show that it was contemplated by the Legislature that the County Courts should have jurisdiction in detinue, and that the County Court had jurisdiction up to 40*s.*, and by the 11th section of c. 61 in detinue also. The jurisdiction was extended by the 3rd section of c. 61, first to 20*l.*, and then to 50*l.* By the 3rd section of c. 95, the County Courts are to have all the jurisdiction exercised by the old courts, and something more as well; and the 58th section says, that the County Courts have general jurisdiction in "all pleas of personal actions, whether of debt, detinue or damage, where the debt or damage claimed is not exceeding 50*l.*", then having been clearly contemplated by the Legislature, we must so construe the words "debt or damage" as to include detinue.



vision is in the 63rd section for plaintiff's reducing the amount of abandonment of excess above 20*l*., and the power given to the defendant by the 82nd section of paying money into court in satisfaction of plaintiff's demand, are inapplicable to an action of detinue. The result, however, of that would be only to reject detinue from those cases. Mr. Hall also says, that sections 90 and 98 depend on the amount of debt or damage claimed; but under section 58, those words, "debt or damage," include detinue, as I think they do, the objection fails. It is further said, that the 94th section cannot be so explained. That section refers to the mode of execution; and it is said that, because the mode there provided is not applicable to detinue, and no other provision for execution is given in the act, detinue is not included in the jurisdiction conferred by the act. But it should be observed that the execution provided for by section 94 is only applicable when an order has been made for the payment of a sum of money, which is altogether different from detinue. There is, however, in the act, a method of getting execution in detinue. The 3rd section refers to the new courts all the powers and jurisdiction of the old courts; and, as the latter certainly had jurisdiction in detinue, it is transferred to the new courts, and the judgment and execution follow, as in the former practice in detinue under *justices* in the old courts. With respect to the second point, whether the defendant had power to amend the plaint by altering the form of action, he did, the answer is this—if he had no authority to do so, it would be struck out, in which case, it will remain as before; but I think that, notwithstanding the amendment, the action remains an action of detinue.

LAURE, J.—I am of the same opinion. I think the two acts referred to are to be read together, so that if the first act comprehends detinue, it may do so. The purpose is, I think, clear enough; for the 58th section says, the court shall have jurisdiction in all pleas of personal actions, where the debt or damage is not more than 50*l*.; and detinue is a personal action. Looking generally at the scope of the act, we should see whether, without abandoning the literal verbal construction, we can carry out the purpose of the Legislature. I think not only that within the general spirit of the act detinue is comprehended, but that it is even so by the very letter. Sections 89, 90 and 91 of the first act may, perhaps, be instanced, in which the provisions are not applicable to detinue; but the more recent act has the effect of modifying those sections, for it imports the word "detinue." I do not see why a defendant in detinue should not be permitted to pay a sum of money into court, under section 82, in satisfaction of the plaintiff's demand, and succeed in case the defendants should prove not to be worth more than the sum so paid. Section 94, that does not apply to cases where a certain specific chattel is sought to be recovered. I think that, looking at the words of the 58th section, or taking both the acts together, the County Court has jurisdiction in actions of detinue. The questions in question here are, no doubt, of peculiar value; but if

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realty had been shown to arise. I concur, then that this rule must be made absolute.

CRESSWELL, J.—I also am of a like opinion. 7 9 & 10 Vict. c. 95, transfers to the new courts a the old County Courts for the recovery of debts a therefore detinue is included. Supposing the 58 apply to detinue, then the jurisdiction would b sum recoverable in the old County Courts—40s. expressly enlarged by the Extension Act up to 4 is included.

WILLIAMS, J.—I am of the same opinion. I “debt or damage” in the 3rd section of the act actions of detinue by the 13 & 14 Vict. c. 61. A that jurisdiction was ousted because of the value if that objection had been raised in the course of prevail; but no such objection was then raised, a unnecessary to consider it now.

## COURT OF QUEEN'S BENCH.

June 7, 1853.

*Re* EDWARD BOYCE.

*habeas corpus*—Several commitments by judge of County Court for nonpayment of money—New default—9 & 10 Vict. c. 95, ss. 99, 100, 103.

Under 9 & 10 Vict. c. 95, ss. 99 and 103, the judge of a County Court has power to commit a defendant who is summoned for nonpayment of money pursuant to a judgment of that court as often as a new default is made; and where therefore a judgment debtor has been once committed for seven days for nonpayment, he may at the expiration of that imprisonment be again committed if, having the means of paying, he still refuses to pay, upon which, the decision of the judge of the County Court is conclusive.

WRIT of *habeas corpus* had been issued to the keeper of White-Cross-Street Prison to bring up the body of Edward Boyce. The writ was issued upon an affidavit of the applicant, in which it appeared that a judgment for 3*l.* 15*s.* had been recovered against the prisoner in the Brentford County Court in action of *Clements v. Boyce*; that the judge had made an order for payment by instalments; and that upon default being made the prisoner had been committed for seven days under the 99th section of 9 & 10 Vict. c. 95, which gives power of commitment, "it shall appear to the satisfaction of the judge of the said court that the party so summoned has then, or has had since the judgment obtained against him, sufficient means and ability to pay the debt or damages or costs so recovered," &c.; that the prisoner was subsequently summoned and committed three several times for seven days each, under the same section, for nonpayment of the debt.

The return to the writ at first set out only the last commitment, which was good upon the face of it; but afterwards it was amended by consent, and both the first and the last commitment, under which the prisoner was now confined, were set out; and the return stated that, after the expiration of the previous imprisonment, he had been again summoned, when it appeared to the satisfaction of the judge that he had had the means of paying the debt and refused to pay. The prisoner's affidavit stated that he had been imprisoned

cause of committal on both occasions were one and the first imprisonment, therefore, extinguished. That no commitment, after the first, would be in the same order; but it was the duty of the judge to show the original order under the 100th section. The warrants in both cases being the same, showed them to be the same; the words "new default" showed that the commitment must be something different. [LORD CAMPBELL, C. J.—That was a matter for the judge to determine. Was it not intended, looking at the warrant, that the prisoner should find the means, refused to pay? ERLE, J.—Are not commitments settled statutory forms?] The form was the same; it is submitted, therefore, that, upon the return, there was no new default. [ERLE, J.—How can it be said that the cause of both commitments was the same, in August and the other at a different period? with both that the prisoner may have had money to satisfy the judgment, and said, I will never satisfy it. The cause of commitment must appear with each return to a writ of *habeas corpus*: (Bac. Abr. Ha. 31. 15s. in his pocket and still refuses?) It is by the first commitment the judge's power was exhausted, that the 103rd section referred to a new default, did not sufficiently appear on the return that there was a default.

LORD CAMPBELL, C. J.—I think the prisoner is mandamus. The warrant is good on the face of it, expressly on the words of the 99th sect. 9 & 10. The warrant recites the summons and judgment, and that judgment had been obtained, the prisoner had been

acknowledged his ability, and refused under such circumstances, judge was authorized again and again to make out a fresh warrant. We must presume the judge did his duty; he was solely upon the question whether the prisoner had the means of paying. This is a formidable power vested in a County Court—one that is not given to the judges of the Superior Courts; we must suppose that he did his duty.

OLERIDGE, J.—I am of the same opinion. The case turns on answer to two questions; the first that raised by Mr. Francis, whether the judge has power to commit twice or more times on the same ground. If he has not, the committal (except it be under 100th section) could not be sustained; but it would be unreasonable if it was so. The judge would naturally be disposed to treat a first offence lightly; and this construction of the statute would be an inducement to the debtor afterwards obstinately to renege. I think that *toties quoties* a default is made, the judge has power to commit for a default of the same kind; means have come into the hands of the prisoner since the judgment; the judgment as to that must be conclusive. I think, therefore, that he should be committed.

BLE, J.—It is clear that the judge, under sect. 103, has power to commit for every new default. In case of commitment on a warrant-summons there is a parliamentary form. Mr. Francis argued that there has been two commitments for one default; upon the face of the warrants, giving the judge credit for the conscientious discharge of his duty, they were different; one was in August, the other subsequently.

ROMPTON, J., concurred.

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Several—  
commitments—  
New default.

*Prisoner remanded.*

## COURT OF EXCHEQUER.

June 11 and 13, 1853.

EARL OF HARRINGTON v. RAMSAY

*Jurisdiction—9 & 10 Vict. c. 95, s. 122—Recovery*  
*The County Courts have jurisdiction under the 122nd section of the Act if either the value of the premises or the rent did not exceed 50l. per year.*

THIS was a rule for a prohibition to the judge of the County Court to restrain him from issuing a writ of prohibition in respect of certain land which had been the subject of an application to him under the 122nd section of the Act. At the trial before the County Court judge it was found that the rent of the premises in question was 41l. per year, and the jury found that their value exceeded 50l. per year. The defendant contended that the judge had no power to issue a writ of prohibition if either the annual rent or value exceeded 50l. The judge, however, ruled adversely, and judgment was given against which the defendant had appealed, and at the present rule.

*Wise* now showed cause, and contended that the grammatical construction of the 122nd section must be that if either the annual rent or the annual value of the premises did not exceed 50l., the court should have jurisdiction, and, that it was immaterial what the value might be so long as it was less than 50l.

*Bramwell* (with him *Smith*), contra.—I shall

at of rent. A tenant might take land on a building lease 25*l.* a year, upon which he might build a house worth 500*l.* a year, and surely it could not be contended that on property of that value the County Court had jurisdiction. This, in fact, has been already decided in *Crowley v. Vitty*, 21 L. J. 135, Ex.; and in *Person, B.*, is there reported to have used the very argument now submitted to the court with reference to the rent forming the criterion. The learned judge is there reported to have said, "That cannot be so always. Suppose a man takes a piece of land and pays 25*l.* a year ground rent, and he builds a house on it worth 500*l.* a year, could the owner of the land go to the County Court under this section?"

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ALDERSON, B.—I do not think I used that expression. If I had said so then, I have no doubt now that I was wrong.

*Vise.*—*Feuron v. Norval*, decided in the Queen's Bench, is an opposite authority, and was not cited when *Crowley v. Vitty* was decided.

POLLOCK, C. B.—I have no doubt that this rule ought to be discharged; unless we can read the statute so as to turn "or" into "and," the County Court has jurisdiction. I am certainly not disposed to do so.

ALDERSON, B.—If you were to introduce the word "either," I should read "where either the value of the premises or the rent," &c. and not exceed 50*l.* by the year," then the construction of the section is plain and undoubted; and I do not think that the omission of that word makes much difference.

PLATT, B., concurred.

MARTIN, B.—No doubt cases may arise where the value of the premises may much exceed 50*l.* a year; but the Legislature has not provided for those cases; and if value were to determine, that would give rise to conflicting evidence. I am of the same opinion as the rest of the court; we could not construe this section in the way contended for by Mr. Bramwell, without turning "or" into "and," as in another clause of this act "may" has been read "shall;" and, as far as I am concerned, I will always oppose it.

At a later period of the day the court expressed a doubt, and asked to have the case re-argued.

June 13.

POLLOCK, C. B.—We proposed to have the case of *Lord Harrington v. Ramsay* re-argued; but on consideration we think we cannot read "or" for "and." We have since looked at the act, and the clear grammatical construction is strictly in accordance with what we have decided; but we are satisfied that if the attention of the Legislature had been called to the point, the clause would have been differently framed, so as to exclude the jurisdiction of the County Court in such a case; but we, sitting here as we do, do to construe the acts of the Legislature as we find them, and cannot change "or" into "and," or turn an affirmative negative

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COURT OF QUEEN'S BENCH

June 13 and 25, 1853.

EARL OF HARRINGTON v. RAMSAY.

*Jurisdiction—Recovery of tenements—9 & 10 Vict. . Possession of tenements may be recovered in the Coun 9 & 10 Vict. c. 95, s. 122, where the annual rent paye the tenancy does not exceed 50*l*., although the an exceed that amount. Crompton, J. dissentiente. Ear v. Ramsay, ante, p. 154, confirmed.*

**B**RAMWELL (*F. J. Smith* with him) applied prohibition to the judge of the Brompton County Court, to restrain him from issuing a writ o certain land, for the recovery of which the plaintiff plaint under 9 & 10 Vict. c. 95, s. 122, in the Coun case was tried before a jury, who found that the rei 4*l* per annum, but that the value was 5*l* per s was thereupon contended that the judge of the Cou



fine has been paid in respect of the holding, whatever may be the value of the premises. This view is supported by the decision of the Court of Exchequer in this case, and also by the judgment of Patteson, J., in *Re Fearon v. Norvall*, 18 L. J. 9, Q. B. The jurisdiction is limited to where the tenancy has expired or been fully determined, and a summary remedy is given thereupon. The defendant contends that this section takes away the jurisdiction where the annual value exceeds 50*l.* though the rent does not; but this section creates the jurisdiction, and the present case comes within one of the conditions, the rent being under 50*l.* and no fine having been paid. The alternative is put to meet the case where there is no rent payable, and then the annual value is the criterion. In *Crowley v. Vitty*, 7 Ex. 319, the rent was more than 50*l.*

*Bramwell and Smith*, in support of the rule.—The real question is whether the jurisdiction of the County Court is taken away, if either of the conditions in sect. 122 do not exist. The words "where the value of the premises or the rent payable in respect of the tenancy does not exceed 50*l.* by the year, and upon which no more shall have been paid," support the construction that the jurisdiction is excluded when either condition does not exist. The object was to give a limited jurisdiction and a summary remedy where the annual value of the property was under 50*l.*; and, as said Alderson, B., in *Crowley v. Vitty*, rent is not the criterion for ascertaining whether the County Court has jurisdiction or not, otherwise a tenant for a breach of covenant might be turned out of possession summarily in a case where he had built a house of considerable value upon land demised for 50*l.* per annum.

*Cur. adv. vult.*

June 25.

LORD CAMPBELL, C.J., after stating that Erle, J., who was absent, had seen the judgment of him, Lord Campbell, and concurred in it, proceeded as follows:—I am of opinion that the Court of Exchequer has put a right construction on the 10 Vict. c. 95, s. 122. The object of that section was to give landlords a summary remedy against tenants holding over, when the value of the premises, or the rent payable in respect of the tenancy, does not exceed 50*l.* by the year." Here the annual value did exceed 50*l.*, but the annual rent fell short of that sum; and the defendant contends that the County Court has no jurisdiction. It is said that these are alternative conditions, and that if either the rent or the value exceeds 50*l.* by the year, the County Court has no jurisdiction. It must be confessed that there is some carelessness in the wording of this clause, leaving it apparently open to the objection now relied on; but there is nothing so absolute in the language as to justify the court in raising it against what appears to be its general intention. I think the effect of the section is as if the Legislature had expressly enacted that on either condition existing the County

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authority in favour of this rule; and I think that if the rent or the value exceeds 50*l.* by the year, the jurisdiction of the County Court is excluded. The 122nd section excepts a provision to cases where no fine shall have been paid, but it could not have been intended to give jurisdiction in cases where the rent is under 50*l.*, whatever may be the value of the premises.

*Ru*

## COURT OF EXCHEQUER.

*November 4, 1853.*ROBERTS v. WARDELL, *ex parte* M'FEE.*Interpleader—Rule 145—Prohibition.*

*interpleader summons having been taken out in a County Court, was heard, when the execution creditor made an objection that the particular claim delivered under rule 145 was insufficient, and the judge decided in his favour, and dismissed the summons :*

*1, that a prohibition properly issued to restrain the further proceedings of the County Court ; that the jurisdiction of the judge in the original suit was suspended by the interpleader summons ; and that he could not give himself jurisdiction by deciding upon a technical objection.*

*address of the claimant being given at Elizabeth-terrace, instead of Elizabeth-place, is not such a mistake as to make the particulars of demand delivered under the 145th rule void.*

In this case a plaint had been entered in the Brompton Court (*Roberts v. Wardell*), and, judgment having been given for plaintiff, execution had issued, and certain goods were seized which M'Fee laid claim. An interpleader summons was accordingly taken out, and the claimant's case had been heard, when it was objected, on the part of the execution creditors, that the particular of claim required to be delivered by rule 145 (*a*), for the regulation of proceedings in the County Courts, pursuant to 12 & 13 Vict. c. 101, s. 12, was insufficient, inasmuch as the claimant was therein described as of Elizabeth-terrace,

) The 145th rule provides that, "where any claim is made to or in respect of any goods or chattels taken in execution under the process of the County Court, or in respect of the rents or value thereof, by any landlord for rent, or by any person, not being the party to whom such process has issued, and summonses have issued on the application of the creditor charged with the execution of such process, such summonses shall be served in such manner and mode as hereinbefore directed for a summons to appear to a plaint, and the claimant shall be deemed the plaintiff, and the execution creditor the defendant ; and the claimant shall, clear days before the day on which the summonses are returnable, deliver to the said creditor, or leave at the office of the clerk of the court, a particular of the goods or chattels claimed to be the property of the claimant, and the grounds of his claim ; or, in case of a claim for the amount of the amount thereof, and for what period, and in respect of what premises, the same claimed to be due ; and the name, description, and address of the claimant shall be fully set out in such particular, and any money paid into court under the execution shall be retained by the clerk till the claim shall have been adjudicated upon : provided that, by consent, an interpleader claim may be tried, although the above rule has not been complied with."

the insufficiency of the particular of a claim being decided that it was not made too late, and dismissed and the remedy of the claimant should have been compelled the judge to proceed with the interpleader proper person to decide whether the address in the insufficient is the County Court judge; and, if he in that, it is no ground for prohibition. If this above 207. it might have been a case of appeal. jurisdiction in the County Court judge, and prohibited at the same time as appeal. In the course of the following cases were cited: *Thompson v. Ingham* Q. B.; *Reg. v. Richards*, 2 L. M. & P. 263; *Robin* 2 Ex. 333.

POLLOCK, C. B.—The court is of opinion that rightly issued. Whilst the interpleader summons decided, the jurisdiction of the County Court judge suit was suspended, and he could not give himself deciding, as he did, on the sufficiency of the plea. This prohibition merely acted as a stay of proceedings selling the goods. My brother Parke, in making of opinion, in which the court concurs, that the address was not such as was calculated to mislead is not now suggested that any inconvenience has arise in consequence, or even that there is another called Elizabeth-terrace in the neighbourhood. Court judge therefore decided erroneously on a technical when it would have been more conducive to justice have decided the interpleader summons on its merits that decision given himself jurisdiction in this case wise he had not; and the court thinks that, for the it is necessary to prohibit him from exercising special

## COURT OF QUEEN'S BENCH.

November 15, 1853.

HOWARD v. REMER.

*Distress for tithe rent-charge—Plaint for unlawful distress—  
Particulars of claim—Notice of action.*

*Plaintiff in the County Court delivered particulars of his claim, containing six items. The fourth was for continuing on his premises and proceeding to sell after abandonment of a distress. He had given a notice of action pursuant to 5 & 6 Vict. c. 54, s. 19, wherein he stated his cause of action to be "for entering his premises and seizing three in-calf heifers, under colour of a distress, and also for selling and driving away three heifers belonging to him." The County Court judge held that the plaintiff was not entitled under that notice to give evidence of the fourth item in his particulars; but this Court held that he was, and directed a new trial.*

**HIS** was an appeal from the decision of the County Court of Cheshire. The plaintiff had issued a summons out of that court in the nature of an action for an illegal distress against the defendants, who had distrained his goods for arrears of a tithe rent-charge. The plaintiff's particulars contained the following items:—1. For unlawfully entering his premises, and seizing and selling three heifers under colour of a distress. 2. For unlawfully selling three heifers not distrained. 3. For not having the cattle so sold lawfully appraised. 4. For continuing on the premises and proceeding to sell after abandonment of the distress. 5. For extortion in the distress. 6. For not returning the overplus. Pursuant to statute 5 & 6 Vict. c. 54, s. 19, the plaintiff had given ten days' notice of action, describing the cause of action to be for entering his premises, and seizing three in-calf heifers, under colour of a distress, and continuing there for several days, and also for selling and driving away three heifers. Upon the trial it was objected that the notice of action was insufficient to let in several of the claims made by the plaintiff; and the judge decided that no evidence could be given upon the fourth, fifth or sixth items of the claim, but admitted evidence upon the other three. The case went to a jury, and a verdict was found for the defendants.

*Vatson*, for the plaintiff now contended, that as to the fourth, fifth and sixth items no notice of action was necessary, they not  
OL. II. M

technicalities should be sent up to us from the  
We have got rid of special demurrers in the Sup  
now we are called upon to consider, by way of  
County Courts, points as alien from the merits  
were raised by special demurrer. The County  
my opinion, to decide according to the *aequum e*  
referring such nice questions to the Superior Cou  
present case there must be, I am sorry to say, a n  
the learned judge excluded evidence which, I thi  
been admitted. The fourth ground of claim i  
particulars is such that either no notice of a  
necessary, or the notice given was sufficient.  
anything that was done in the course of the distr  
necessary, because I agree that the statute appli  
done from the commencement to the conclusion  
but if a notice was necessary, then I think thi  
sufficiently large language to apply to this griev  
to something which happened after the distress ha  
abandoned, and was at an end, then no notice w  
the grievance is one upon which an action at com  
maintained, independently of the statute altogeth

COLERIDGE, WIGHTMAN, and CROMPTON, JJ

Ne

## COURT OF COMMON PLEAS.

November 8, 1853.

SCHULTZ v. LEIDEMANN.

*re appeal—Charter-party—Custom—Misreception of evidence  
—Costs of appeal.*

of a charter-party, it was agreed between the captain and that the vessel should "on the first opportunity, and with all dispatch after the signing of the charter-party, proceed to the on arrival there be ready forthwith, in regular turns of loading, on board, by spout or keel, as directed, a full and complete four keels of coals, and the remainder coke." The vessel pro- the Tyne, and the day after her arrival was entered by the on the coal-list, in conformity with statute 8 & 9 Vict. c. 73, the loading of coal vessels with coal in the river Tyne. The of that statute are limited to the loading of coals, and expressly include coke. The day after the vessel's arrival in the freighters went to the coke-fitters, to ascertain when the old get her turn for loading coke, and were informed that two ust take their turns before her. On the 3rd Feb. the vessel, ken in her coal, went to "the S. and T. drop," for the purpose in coke. Snow having fallen, the passage of coke down to s edge was prevented, and the vessel lay waiting her turn for he 11th March, when she completed her cargo. In the mean- he 17th Feb. the captain protested against the detention of the d the freighters offered to ship the required quantity of coke r place, on payment of a shilling a ton more by the captain. declined. The captain brought an action in the County recover 50l. damages from the freighters for not loading his a reasonable time, and for the wrongful detention of the d the nonperformance by them of the stipulations in the arty, in respect of putting on board the cargo. The pleaded, amongst other defences, that the charter-party for the vessel to be loaded in regular turns of loading, and a particular time; and that the question of a reasonable mable time did not arise on which to charge them. Evidence tendered by the freighters to show that there was no act of nt to regulate the turn for coke as there was for coals; and tom prevailed at the port of loading to enter a vessel as soon red on the fitter's list, and to load coke accordingly. The cted this evidence, and directed the jury that under the arty it was necessary that the cargo of coals and coke should

**T**HIS was an appeal from the decision of the County Court of Northumberland, held at Tyne, in an action tried before him with a jury August last, wherein Frederick Edwin Schultz, was the plaintiff; and the present appellant, Augustus Leidemann, the defendant.

The circumstances under which the action was proceedings up to the time of the judgment, which the plaintiff for 50*l.* (being the full amount of sufficiently appear from the case transmitted to case has been agreed to by both appellant and resigned and sealed by the judge of the County Court.

The case is as follows:—In the County Court land, at Newcastle-upon-Tyne. An appeal to the Common Pleas, between Frederick Edwin Schul Augustus Leidemann, defendant.

This is an action brought by the plaintiff against the defendant to recover the sum of 50*l.*, for not loading the vessel with coke within a reasonable time: and the particulars of demand:—

“Messrs. Augustus Leidemann.

“To Frederick E

1853. } For damages sustained by reason of }  
March. } loaded the ship or vessel called the *T* }  
in a reasonable time, and by reason of the wrong }  
the said vessel for an unreasonable time, and }  
and your not having performed the stipulations contained }  
in the charter-party, dated the 11th January, 1853, made }  
between the said Frederick Edwin Schultz of the one part }  
and the said Augustus Leidemann of the other part, and by and on your part to be paid



every way fitted for the voyage, shall, with the first opportunity and all possible dispatch after the signing of this charter-party, proceed to the river Tyne, and on arrival there be ready hith, in regular turns of loading, to take on board, by st or keel as directed, not higher than Howdon, a full and complete cargo of four keels of coals and the remainder coke. The coals to be separated by mats from the coke, and the mats to be bound by the ship, not exceeding what she can reasonably stow on board. The cargo to be carried over and above her tackle, apparel, provisions, and furniture; and being so loaded, shall be ready for sea and proceed on the first opportunity and all possible despatch to Carthagena, Spain, and there deliver the same to the freighter or assigns as directed from alongside, free of expense and risk to the ship, on the freighter paying the same at and after the rate of twelve pounds and fifteen shillings sterling per keel of eleven tons of coals, and the same rate per keel of twenty-one tons and four keels of coals, both delivered in full, the merchant paying all ordinary dues on the cargo and the ship, paying all pilotage, and other charges, including Ramsgate and Dover dues, and extra duty on the cargo in consequence of the ship not being British. As soon as the cargo is shipped, the captain shall and clear without delay at the custom-house, call at Messrs. A. Leideemann and Co.'s office, and sign bills of lading without prejudice to the tenor of the charter as presented; freight to be paid on loading and right and true delivery of the cargo, in cash at the current rate of exchange. The act of God, the Queen's enemies, restraint of princes, rulers, and governments, fire, and all every other dangers and accidents of the seas, rivers, and navigation of what nature and kind soever, during the said voyage, are to be mutually excepted. One working day per keel to be allowed to the freighter, weather permitting, holidays excepted, in loading the cargo after the ship has obtained a proper discharging berth, and is ready in turn to discharge according to the orders and laws of discharge at port of discharge. Demurrage and above the said lying days at five pounds per day. Any damage occurring during the voyage to be settled according to the laws and customs of the place where the cargo is insured. No part of the cargo to be used during the voyage, or to be retained on board after discharging. This charter being concluded by Messrs. A. Leideemann and Co. on behalf of another party, it is agreed that the liability of the former shall cease as soon as they have shipped the cargo, and that the vessel is to be reported and cleared by them at the custom-house at Newcastle; and all money for charges or otherwise due by the owner or master shall be paid on the captain's receipts; penalty for nonperformance of this agreement; amount of freight; ship to be addressed to receivers of cargo, paying two per cent. commission.

"For Capt. SCHULTZ,

"BOLDEMANN, BOWNES and Co.

"A. LEIDEMANN and Co., as Agents."

SCHULTZ

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*Charter-party  
—Evidence of  
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of appeal.*

after the arrival of the vessel at Newcastle, to wit January, Messrs. Leidemann and Co. entered her in the Hartley Coal-list for four keels of coal.

On the following day the captain, Mr. Borries, Messrs. Boldemann, Borries, and Co., and Mr. Leidemann, went to the South Tanfield Coke-works to ascertain when the *Triton* would get her turn. They were told there that two ships were on turn, and that it might be six weeks before she could be loaded. The ships then on the list were the *Good Intent*, 174 tons, and the *Fourteen*, 347 tons.

On the 3rd February last the said vessel was chartered by the plaintiff for a quantity of coals specified in the charter-party, and to be loaded with coals on any day between the 1st and 15th February, and that date, if she had been ready for them. On the 15th February the vessel proceeded to the Stanhope and Tynemouth wharves for the purpose of taking in coke.

In the early part of February the plaintiff requested the defendants to load his said vessel with despatch, which they consented to do, provided the plaintiff would pay the difference in cost between coke at the Stanhope and Wallsend wharves. This offer the plaintiff refused, but was willing to pay 6d. per ton, as he wished to be loaded. The defendants, however, would not accept his offer.

That on the 17th February last the plaintiff requested the defendants for the delay in not loading his vessel within a reasonable time; and a notice of his having done so was given to Messrs. Ingledew and Dagget, as notaries, to the effect that the vessel is as follows:—

“Newcastle, 1

“Gentlemen,—We are requested by Capt.

To which letter the defendants replied as follows:—

“Newcastle-on-Tyne, Feb. 18, 1853.

‘Capt. Schultz, of the *Triton*.—Sir,—In reply to the letter of 17th instant, sent us on your behalf by Messrs. Ingledew and Dagget, we beg to give you notice that your ship the *Triton* was put on the coke list, and shall be loaded in regular turn as charter-party, as previously offered by us when you arrived. We now again propose to you to load your ship with any other table coke, if readier turn can be obtained, subject to your making the difference in price. We wait your reply, and remain,

“Your obedient servants,

“(Signed) A. LEIDEMANN and Co.”

The loading of the *Fourteen* was not completed until the 2nd March last, during which time the plaintiff's vessel was lying at the Drops waiting to be loaded. From the 13th to 26th January last the railway over which the coke had to pass to reach *Fourteen* was stopped up by snow, which prevented that vessel being sooner loaded. On the 3rd March last the *Triton* commenced loading, and on the 11th March was fully loaded, and bills of lading were signed. On the 8th July the defendants received from plaintiff's attorneys the following notice:—

“Newcastle, 8th July, 1853.

‘Dear Sirs,—We are instructed by Capt. Schultz, of the *Triton*, to apply to you for payment of 50*l.* claimed by him for detention, in not loading the vessel with a cargo of coke according to charter-party. Will you be so good as inform us whether payment will be made or resisted?

“Yours truly,

“INGLEDEW and DAGGET.

“Messrs. A. Leidemann and Co., Quay-side, N.C.”

The plaintiff contended at the trial that no question arose as to the charter-party. That defendants induced plaintiff to enter into said charter-party, by saying that his vessel should be loaded promptly; that the *Triton*, before she could take on board her cargo of coals, must necessarily have time to discharge her ballast; that the coals had to be put on board before the coke; that the Coal-mine Act, which applies to vessels loading coals, does not apply to coke; and that it is not the custom of the port for vessels to wait their turn for coke, but only a reasonable time; that from the 3rd of February, being the day the said vessel was ready to take on board the coals, to the 11th March last, the day on which she was loaded, was an unreasonable time to detain the said vessel; that the said vessel could have been loaded in much less time at some other wharf, to wit, at Carr's Wallsend Spout; and that 50*l.* was a reasonable claim for detention.

The defendants contended, first, that the particulars of the plaintiff's demand annexed to the summons were informal and indefinite, and did not sufficiently describe and set forth, as they should

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precedence of the *Fourteen*, which ship was not ready until the 3rd February. Fifthly, that the turn could not, after the 3rd February, arrive until the vessel was loaded, and that vessel was not loaded until the 10th, and that the *Triton* was loaded in nine days from commencing, a time admitted in evidence to be a reasonable time for loading her cargo of coke.

Evidence was given by the defendants' witnesses that the vessel, called the *Water Nymph*, left London on the 18th of January and arrived at Newcastle on the 21st of that month. The *Triton* loaded her coals on her first arrival at Newcastle, and have at once proceeded to the Stanhope and Tyne, and loaded her cargo of coke, as the *Fourteen* was not ready to turn until the 3rd February.

Evidence was also tendered to show that, although there is no act of Parliament to regulate the turn for coke, coals, in Newcastle, yet that it is customary in the port for a vessel as soon as chartered on the fitters' list for to load coke accordingly; but this evidence was not admitted by the learned judge, and was not put to the jury at the trial. The learned judge held that the particulars were sufficient to direct the jury that under the charter it was necessary that the cargo should be put on board in turn, and left it to the jury to say whether the vessel had been detained an unusual amount of time; and also that he would assume that the ship was to have a regular turn, yet it was not a sufficient answer to the claim for detention for an unreasonable time, otherwise the vessel would be detained for months, and that the expression "no loading" was in the opinion of the learned judge in evidence that the coal was to be loaded first, and the coke afterwards. The defendants appeal against this decision. The case is now before the Court of Appeal.

oke are regulated by the custom of the port. Evidence of this  
om was tendered, and ought to have been admitted by the  
re, at the trial, but was rejected. Whether loading coal or  
e, the vessels, under the statute as regards the former, and by  
re as regards the latter, should have been loaded in her turn,  
she was so loaded. [JERVIS, C. J.—The judge does not say  
y he rejected the evidence.] No. The case of *Robertson*  
*Jackson*, 2 C. B. 412, is very close to this, and a strong  
hority in appellant's favour. In *Sayers v. Jones*, 2 Exch. 111,  
as held that evidence of usage in similar circumstances was  
missible.

*Idall*, for the respondent.—What the County Court judge said  
, in effect, this: "You must put a reasonable construction on  
charter-party, and, doing this, it cannot be said that respon-  
t loaded the vessel within reasonable time, as he should have  
e." [JERVIS, C. J.—Do you mean to say that "loading within  
asonable time" must be construed without reference to cus-  
?] No. The captain must load at a practicable spout, and  
re was an opportunity offered him by the respondents if he  
ld pay a shilling a ton more for the accommodation. [JERVIS,  
J.—If you could make good that argument, the coal-owners  
ld give you a statue of gold; for a captain anxious of loading  
vessel would say, "I have a right to go to a particular spout,

I can there get quickly loaded," although the coal-owner  
ht then be charging 5s. a ton more than charged at the adjoin-  
spout.] There is no ambiguity on the face of this contract, so  
o let in evidence of usage; therefore, the judge being right,  
appeal should be disallowed.

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JERVIS, C. J.—This is an appeal, not for the purpose of enter-  
the verdict for the defendants, but simply that the case may  
put again in a proper train for inquiry by our granting a new  
J on the ground of misdirection. I am of opinion that the  
eal should be allowed, and another trial had. Without refer-  
e to what the ultimate rights of the parties may be, or how far  
are governed by custom, the simple question is, whether the  
re was right or wrong in rejecting the parol evidence of the  
om that was tendered by the appellants. I think he was  
ng. He read the charter-party as if it meant that the appel-  
s were to load the coal first and the coke afterwards, and  
ught that "in regular turns of loading" meant that and that  
If it did so, he was right; but I apprehend that is not the  
ning of the charter-party. When we know that there is an  
of Parliament regulating the turns of coal, and that Newcastle-  
Tyne is a place crowded with ships, the owners of which are all  
ous to get a cargo, we may be certain of the necessity of some  
lation on the subject; and, the words "in regular turns"  
g ambiguous, or at all events sufficiently so to let in evidence

WILLIAMS, J.—I am of the same opinion. 'Tl  
mitted for the consideration of the court is, whet  
of the judge of the County Court in rejecting tl  
dered, and his direction to the jury, was correct  
the rejection of the evidence, I think he was wro  
evidence would have thrown such light upon the  
would have led his mind to a different conclusion  
point on which he asks our opinion. That second  
his direction to the jury that the contract was to lo  
oke afterwards was right or not. I think it was  
he had admitted evidence of the custom, he would  
different conclusion.

TALFOURD, J.—The words in the charter-  
refer to a course of dealing *dehors* the charter-  
therefore evidence was admissible to explain the m  
terms.

*Bovill* applied for the costs of the appeal.

*Udall* opposed the application, and cited *Moun*  
1 Ell. & Bl. 630.

JERVIS, C. J.—We were formerly inclined to  
ordering a new trial, in cases of misdirection, the  
made without costs, and we made an order accordi  
sequently, upon conferring with Parke, B., and o  
countermanded that order and made a fresh ord  
should always follow the result of the appeal.

*Udall* referred to *Mountnoy v. Collier*, *ubi supra*.

JERVIS, C. J.—In that case it turned out the  
jurisdiction, and therefore the plaintiff should not h  
County Court at all. It may appear hard to giv  
like the present; but it is very desirable that in r  
amount certainty of practice should prevail, and the

justice done to either of the parties if we confine ourselves to giving merely costs of appeal. Where the judge grants a new trial, he can do it on such terms as he thinks fit; but in this court we have no power over the costs in the cause, but only over those of appeal.

*Rule absolute for setting aside the verdict, and for a new trial.  
Costs of appeal allowed.*

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of appeal.*

## COURT OF QUEEN'S BENCH.

November 23, 1853.

STEPHENSON v. RAINE.

*Jurisdiction—Title to office—Incorporeal hereditament—Prohibition.*

The plaintiff in the County Court claimed from the defendant, as an inhabitant householder within the chapelry of B., certain arrears of "the ancient customary yearly wages, or sum of 4d. from each householder, payable at Easter," to which he alleged himself to be entitled as "parish clerk of the said chapel and chapelry." The defendant disputed the title of the plaintiff to the office of clerk, and also his right to the payment claimed:

*Added, that this was a case in which the title to an incorporeal hereditament was in question within the meaning of sect. 58 of 9 & 10 Vict. c. 95, and that consequently the County Court had no jurisdiction.*

RULE had been obtained calling on the plaintiff to show cause why a writ of prohibition should not issue to prohibit the judge of the County Court of Durham, holden at Barnard Castle, the high bailiff, and other officers of the said court, from their proceeding in the above plaint.

The rule was obtained upon a joint affidavit of Edward Raine, defendant, and G. Allison, his attorney, deposing to the following facts:—That the defendant was summoned to the County Court of Durham holden at Barnard Castle on the 12th May last, in the suit of Jos. Stephenson, who alleged that he was the parish clerk of the said chapel and chapelry, and that he claimed of the defendant the yearly wages or sum of 4d. for the space of five years and upwards. That the defendant is a dissenter, and never frequented the said chapel, and that the said J. Stephenson never

The affidavit concluded "that the said E. R. dispute, and that he, and said G. A. as his at occasion aforesaid, did *bonâ fide* dispute, not and title of the said J. S. to the said office of pari these deponents believe to be a freehold office for li there is any such custom or legal customary payn sum of 4*d.* so claimed as aforesaid, and also the ri the said J. S. to such alleged customary payment.

The affidavits in reply set forth the appointment as clerk of the chapel and chapelry in 1817, terriers and other evidence upon which he relied in claim.

The summons served upon the defendants was i form (after setting out the title of the plaint): "summoned to appear at a County Court, to be hold house in Barnard Castle, on the 12th day of Ma hour of ten in the forenoon, to answer Joseph Ste clerk, Barnard Castle, to a claim for that you are, for the space of five years and upwards next prece Easter last an inhabitant householder within the pa of Barnard Castle, in the county of Durham; and t is and has been and officiated as parish clerk of chapelry of Barnard Castle aforesaid for the space years and upwards now last past, and as such cler to the ancient customary yearly wages or sum of householder throughout the said chapelry, payable that you have not paid to the plaintiff the said y sum of 4*d.* for the space of five years and upw ceding and up to Easter last, or any part thereof, of 1*s.* 8*d.*"



ce, the affidavits show that there is no *bonâ fide* dispute: (*Reg. Wrottesley*, 1 B. & Ad. 628.) Then, is it an incorporeal hereditament? Certainly not; for an hereditament is that which a man may take by inheritance, and may hold to him and his heirs. This office of clerk is merely personal, and quite remote from the nature of an hereditament. A parish clerk is not even a corporation sole, as a bishop is; and the real question here is as to an alleged customary payment, and not as to any title to an incorporeal hereditament. In *Pitts v. Evans*, 2 Stra. 1108, it was held that the parish clerk is a temporal officer, and may maintain *assumpsit* for a debt due to him by custom; and prohibition was granted to the spiritual court for that reason. (He referred also to 3 Burn's L. 68, tit. "Parish Clerk.") Similar claims to the present have also been held cognizable by the County Court. *Davis v. Bolton*, 8 Exch. 153; *Re Baddeley*, 4 Exch. 508; in the former a customary payment was tried in the County Court; in the latter the right to a disputed paving-rate. (He also cited *Lloyd v. Jones*, 1 B. 81.)

*Bovill*.—The cases cited are not in point; but this office is an incorporeal hereditament: 2 Black. Com. p. 36, where it is said, "Offices which have a right to exercise a public or private employment, and take the fees and emoluments thereunto belonging, are also incorporeal hereditaments." (He also referred to pp. 16 and 21.) Co. Litt. 6 a, it is said "an' hereditament is by much the most and most comprehensive expression; for it includes not only lands and tenements, but whatsoever may be inherited;" and, in relation to an office, the less comprehensive word, includes an office: (Bl. 17.) This office is also a franchise, and it is no answer to say that a franchise must emanate from the crown; because the plaintiff claims by prescription, and that presupposes a grant.

*Cur. adv. vult.*

#### JUDGMENT.

LORD CAMPBELL, C. J.—After stating the claim as above, he succeeded thus; the defendant denied that the plaintiff was duly appointed; he also denied that the plaintiff, if appointed, had a right to the payment claimed; and lastly, he denied the jurisdiction of the County Court to decide the question in dispute. The court adjourned the case, to give the defendant an opportunity of applying for a prohibition; and we are now to determine whether the County Court has jurisdiction. Upon the affidavits we must assume that both defences were made *bonâ fide*, and that the points would be inquired into at the trial. *Prima facie* the action is maintainable in the County Court, for this is a personal action, and therefore within the 58th section of 9 & 10 Vict. c. 95; but for the defendant it is said that it falls within the exception in that section, which excludes from the cognizance of the County Court any action of which the title to any corporeal or incorporeal hereditaments shall be in question. Now, without

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RAINE.

1853.

Jurisdiction—  
Incorporeal  
hereditament—  
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STEPHENSON

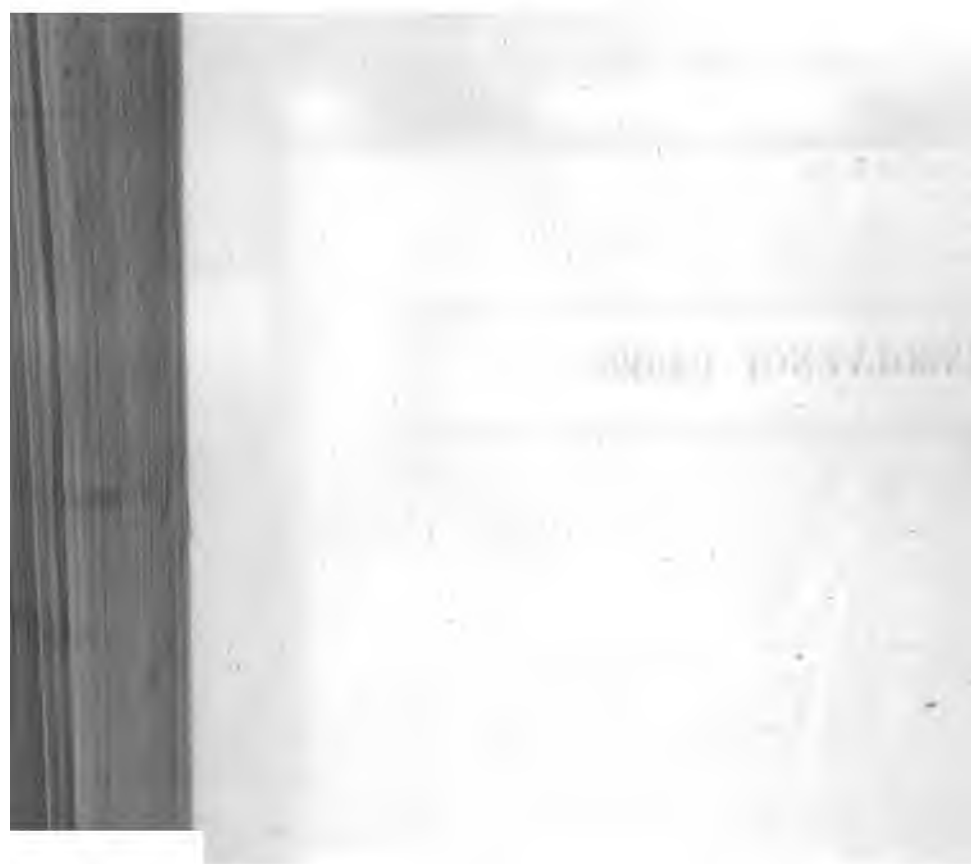
v.  
RAINE.—  
1888.  
—~~Jurisdiction—~~  
~~Incorporated~~  
~~hereditament—~~  
~~Prohibition.~~

doubt, this office is a tenement; and, if we look to the definition of "hereditament" contained in the text-books, we find that the word "hereditament" is the largest and most comprehensive expression, and includes not only lands and tenements, but whatsoever may be inherited, and that, as "tenements" include "offices," so "hereditaments" includes "tenements." We think that it was in this extensive sense that the Legislature has used the word "hereditaments" in the exception to the 58th section, and that it meant to exclude from the jurisdiction of the County Court the trial of the right to such an office as that in question. The rule, therefore, must be absolute. *Rule absolute.*

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**INSOLVENCY CASES.**

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# COUNTY COURTS CASES.

## COURT OF EXCHEQUER.

January 11, 1854.

FIGG, Appellant, WILKINSON, Respondent.

*Case for the opinion of the court above—Time of transmitting same.*

On the trial in the county court judgment was given for the plaintiff, whereupon the defendant determined to appeal, and, on the 1st of July, a draft case was signed and sealed by the judge, with an order by him that the summons and a receipt should be inserted in it. Those documents being in the hands of the attorney for the defendant, at Witney, and a Sunday intervening, they could not be obtained and inserted in the case until the 4th of July, and on the 6th copies were transmitted to the rule office of this court, pursuant to rule 163, which directs that "The appellant shall, within three clear days next after the case is signed and sealed, transmit two copies thereof, by post, or otherwise, in conformity with the provisions of the 13 & 14 Vict. c. 61." A rule having been obtained by the plaintiff to strike out the appeal and for a stay of proceedings:

And, that the case was transmitted in time, for although the judge put his name manually to the case on the 1st of July, the signature was on the understanding that it was not to be considered as put until certain documents were introduced.

THIS was an action tried in the County Court of Oxford, brought upon the warranty of a horse sold by the defendant to the plaintiff for 50*l*. At the trial the judge considered the soundness to be proved, and gave judgment for the plaintiff. The defendant hereupon determined to appeal, and a draft case was signed and sealed by the judge, on the 1st of July, with an order by him that the summons and a receipt should be inserted in it. These documents being in the possession of the defendant's attorney, at Witney, and a Sunday intervening, they could not be obtained and inserted in the case until the 4th of July, and on the 6th copies were transmitted to the rule office of this court. Sections 14 and 15 of the 13 & 14 Vict. c. 61, provide for an appeal, and the manner in which the case is to be settled; and rules 162 and 163 provide for the signature of the case by the judge, the latter rule providing that "The appellant shall, within three

court last term, when the rule was enlarged, that a case might be signed and sealed by the judge of the court. An application had accordingly been made to him, and he refused to sign another case.

*Cripps, contra.*—The question is, was this case signed on the 1st or the 4th July? He contended that it was, and that, therefore, the transmission of the copies was not within the time prescribed by the rules.

POLLOCK, C. B.—I am clearly of opinion that the case should be discharged, and, as it has been so moved, with leave to re-argue, I have raised admits of a ready answer. The plaintiff has put the other side on the horns of a dilemma; he would have the case unless the signature of the 1st July was a valid signature, or unless there was in fact no complete case at all; but the only way of understanding the facts of this case is that the judge put his name manually to the case on the 1st July, which the plaintiff was himself a party; but that the understanding was that it was not to be considered as a signature until certain documents were introduced. The plaintiff has done all that was done; and we must consider that he has done that to which he virtually gave his sanction.

PARKE, B.—I am of the same opinion. It is the plaintiff, by his conduct, who has put himself in the position of having consented that the signature of the case should be valid from the time the documents were introduced.

ALDERSON and MARTIN, BB., concurred.

*Rule discharged.*

## COURT OF EXCHEQUER.

*January 12, 1854.*

BESWICK v. BOFFEY.

*Ex parte MOSES.**Interpleader—Appeal—Jurisdiction.*

*The Superior Courts have no jurisdiction to hear an appeal from a County Court in an interpleader case. The power of appeal is confined to the cases pointed out by sect. 14 of the 13 & 14 Vict. c. 61, of which an interpleader is not one:*

*able, per Martin, B., that particulars of goods and grounds of claim in interpleader cases may be amended, and a new summons issued, if necessary, should the judge so direct.*

THIS was an appeal from the County Court of Clerkenwell. The plaintiff had brought an action in the County Court against the defendant, and recovered judgment for his debt and costs, amounting to 54*l.* odd. An execution was issued upon that judgment, and the defendant's goods seized under the execution, whereupon a Mr. Moses made a claim to those goods as his own under the interpleader rules of practice, and delivered a particular thereof, alleging the same to be the property of the defendant, but without specifying the particular grounds of his claim. He delivered the particulars and notice to the messenger to the court ten minutes before eight o'clock in the evening of that day, which would be five clear days before the day on which the summons was returnable; but the messenger did not deliver it to the court until the next day. Upon the case being called on for argument before the County Court judge, two objections were taken. First, that the grounds of claim were too general, and therefore insufficient; and, secondly, that the notice was not delivered five clear days before the day on which the summons was returnable, it should have been delivered in office hours before four o'clock in the afternoon of that day on which it was delivered to the messenger between seven and eight o'clock in the evening; and, as the messenger did not deliver it until that following day, there was, in fact, no proper service of the notice until that day, when the notice was received by the court from the messenger. The learned judge of the County Court overruled both objections, and decided in favour of the claimant. This was an appeal from that decision.

*Ogle* appeared for the appellant.—Both objections taken in the

the defendant; and the claimant shall, five clear days on which the summonses are returnable, deliver to the officer, or leave at the office of the clerk of the court, a list of any goods or chattels alleged to be the property of the claimant, and the grounds of his claim, or, in case of a claim for a sum of money, the amount thereof, and for what period, and in respect of which the same is claimed to be due; and the name and address of the claimant shall be fully set forth in the particulars; and any money paid into court under the rule shall be retained by the clerk until the claim shall have been tried: provided that, by consent, an interpleader may be tried, although the above rule has not been complied with: if the claimant states generally that the goods are his own goods, without giving any grounds of his claim—Suppose the claimant had had these goods under his possession for twenty years, in what way is he to state the grounds of his claim? If my own goods were to be so taken, it would be for me to give you the dates and exact mode by which I came possessed of them. ALDERSON, B.—Or is it to be described to have been purchased of A., and a clock ultimately appeared that the clock was bought of B., is the claimant to lose his goods? The practice (rule 39), upon this claim, as to the particulars of the goods and the grounds of claim, was in the same vein as that it was decided by the Court of Queen's Bench, that the particulars ought to state how and by what right the claimant claims his title; and, accordingly, where such a notice as to the goods was the property of the claimant, but without any grounds of claim, it was insufficient, and that the court properly refused to adjudicate on it: (*R. v. Chitto* and *Ex parte Tanner. re Cullum v. Ross.* 19 L.



at eight o'clock in the evening; the proper service was not till the day following, when it was delivered to the court by the messenger: therefore it was too late. There is a third point intended to be raised by the other side, as to whether this court has jurisdiction to hear and determine this appeal; the power of appeal to parties aggrieved is given by the 13 & 14 Vict. c. 61, § 4 (the County Courts Extension Act), in any cause of the amount to which jurisdiction is given to the County Courts by that act, which is from 20*l.* to 50*l.* As the amount to be recovered is 54*l.* for debt and costs, the court will infer, although it is not actually stated in the case, that that debt was above 20*l.* under 50*l.*; and by the 2nd section of the same act it is enacted, that that act, and the 9 & 10 Vict. c. 95, and the 12 & 13 Vict. c. 101, shall be read and construed as one act, as if the several provisions in those acts contained not inconsistent with the provisions of that act were repeated and re-enacted in that act. The 145th rule, as framed by the learned judges, would also lead to inference that the power of appeal now extended over the whole. *Robinson*, contra, for the plaintiff, the execution-creditor, was overruled by the court.

COLLOCK, C. B.—We are all of opinion, I believe, in this case, that the appeal must be dismissed, and with costs. The ground on which my opinion is formed is, that I think we have no jurisdiction in the matter at all. In expressing my opinion I will avoid all comment upon the cases which have been cited by Ogle; and I therefore say nothing about them. The court has authority to deal with this appeal; I confine my observations to the determination of that point only, which is sufficient to determine the present question; I think there is no power of appeal from the County Court to this court in a case like this now before us. The power of appeal was first given by the 13 & 14 Vict. c. 61, s. 14; and by no other act of Parliament is an appeal given from the County Court to parties aggrieved. It is strictly confined to the cases pointed out by that section, of which the present is not one. By the 12 & 13 Vict. c. 101, s. 12, power was given to the judges to make rules for regulating the practice of the County Courts: [the learned Lord Chief Baron read that section.] Stripped of technical language, the clause, in short, that the Lord Chancellor may authorize five judges of the County Courts to make general rules for the direction and regulation of their own courts, and that such rules, when approved by five judges of the Superior Courts, and laid before Parliament, shall be law, and have the effect of an act of Parliament. And the question is, whether the 145th rule so prepared gives power of appeal in interpleader cases, in conjunction with the act—which act did not exist before. First, what is the true construction of the words used in that rule? It may, perhaps, be an arguable case, if we had no other rule to guide us than that suggested by Ogle; but, looking at the 145th and 149th rules together, I am of opinion that it was not intended to give the right of appeal

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1854.

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make such rules.

PARKE, B.—I entirely concur in opinion with Baron that we have no jurisdiction to entertain anything upon the first and second points raised in Mr. Ogle, however strong my opinion at present Robinson has not been heard in answer on the power of appeal is given by the County Court 13 & 14 Vict. c. 61, s. 14: [the learned Baron read the claimant here, under the interpleader summons the cause within the meaning of that section. Freed of by the rules made by the judges, pursuant c. 101, s. 12? Are they empowered to make extensive? First, I think they had no such power. I believe they have not given it. It is only rule regulating the practice of the court; and it does not extend to cases of this description.]

ALDERSON, B.—I am of the same opinion. The appeal is given by the 14th section of 13 & 14 Vict. c. 61, s. 14, is confined to claims between 20*l.* and 50*l.* and by consent, in certain other cases. The present case is neither one nor the other. The words of that section are clear. In the one case security is to be given: in the other it is not so. No security is there required, in interpleader cases, are to be given as the rule says. The interpleader order is not, as has been argued, a judgment. It is a discretionary order. Then the rule makes a difference. What, then, does it say? [Baron read the rule.] This only directs the manner of making out the application. It gives no appeal. Again, the rule says this is a claim for a sum between 20*l.* and 50*l.* and sought to be recovered is 54*l.* odd. If not betw

which is misunderstood, and will not bear the construction contended for. If the notice and particulars were not sufficient, or not served a clear days before the return of the summons, it might be necessary to have a new summons, and the judge may grant an amendment if he thinks right (analogous to the ordinary interpleader summonses in interpleader issues in the superior Courts.) In interpleader cases the claimant is to be the plaintiff, and the execution-creditor the defendant; the clerk is to stop the money until the matter is adjudicated upon; different altogether from the cases contemplated in the 14th section of the Act giving the right of appeal. If any slip or slight informality occurs, it is an irregularity only; a new summons might be issued, and the matter amended, the costs to be in the discretion of the judge under the particular circumstances of each case. I think that is really the meaning of the rule; it cannot be that the non-delivery of a full and sufficient particular in every respect in the first instance, and five clear days before the return of the summons, the claimant is thereby to be entirely and altogether defeated of his right to the articles claimed.

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v.

BOFFIN.

1854.

Interpleader—  
Appeal.

*Appeal dismissed with costs.*

[Upon the authority of the above case the Court of Common Pleas subsequently, in the case *Passer and others v. Fothergill*, refused to hear an appeal from the County Court of Hyde in Cheshire upon an interpleader proceeding.—Ed.]

## COURT OF EXCHEQUER.

*January 16, 1854.*

GROVES AND OTHERS, Appellants, JANSSENS, Respondent.

*County Court appeal where parties agree under 13 & 14 Vict. c. 61, s. 17 that the judge shall try though the sum exceeds 50l.*

*Appeal does not lie from the decision of a County Court judge, in an action for an amount exceeding 50l., brought before him by the consent of the parties by virtue of section 17 of the 13 & 14 Vict. c. 61.*

THIS was an appeal from the determination of the County Court judge at Sheffield, in Yorkshire, in an action upon an agreement, dated 21st September, 1849, whereby the plaintiff agreed with the defendant to enter into his service upon terms therein mentioned as his traveller; and for the breach of that agreement this action was brought, and the plaintiff claimed 500l. It was agreed

jurisdiction and power to try such action; provide the said parties or their attorneys shall state in a random of agreement that they know such cause above the said sums respectively, or that they know come in question in such action; and provided that a random shall be filed with the clerk of the said court of filing the demand of the plaintiff: provided all actions to be tried before any County Court with the parties shall be brought and tried in that judgment in which the lands, tenements, or hereditaments thereof, are situate, or in respect whereof such action is brought."

*Quain*, for the appellant.—This gives a jurisdiction unlimited in *amount*, and is extended to the trial of all other exceptions from the jurisdiction of the County Court tried there by virtue of this clause. The learned Judge of the County Court, to whom this matter was so referred, came to a wrong conclusion.

*Willes*, contra.—There is an objection in this case to hearing this appeal; in fact, there is no appeal given in this case where the demand sought to be recovered is more than the value of the land, and where the parties have referred to the decision of the County Court judge by consequence of section of the act mentioned. His decision is final, and he is chosen to give him jurisdiction, and, whether right or wrong, an appeal lies to this court from it. [MARTIN, B.—It may always put their heads together, and, by a stipulation agreed upon, have the opinion of the County Court and this court afterwards upon it, whenever they please.]

*Quain*, in support of the appeal, was called upon to argue that point first.—He was not aware that

in the present. (The 15th and 16th sections of the same act were called to the attention of the court.) [PARKE, B.—Judgment would be final in cases of title and tolls; and the strong inclination of my present opinion is, that no appeal lies in this case; but, as it is a very important question, we will consult the other courts, and reserve our judgment in a few days.]

GROVES AND  
OTHERS  
v.  
JANNEKE.  
—  
1854.  
—  
Appeal.

*Cur. adv. vult.*

PARKE, B. delivered judgment.—This case was argued before brother Alderson, Martin, and myself, in the absence of the Chief Baron. The court intimated they would consult some of the other judges about it, on account of its general importance, before they delivered their opinion; but, on speaking to some of the judges, we found that they would rather not give an opinion conclusively upon this question unless it had been argued before them; and in that respect they are quite right. I have no reason to believe that at present there is any difference in the opinion we are now about to pronounce; and my Lord Chief Baron concurs in the opinion; I having intimated to him at our view of the case is. The question is, whether an appeal lies by the 13 & 14 Vict. c. 61, against the decision of a judge in a case amounting to above 50*l.*, and to a matter of 500*l.*, where jurisdiction is given by the voluntary agreement of the parties to a County Court judge. Mr. Willes took the objection, after the case had been partly argued, that an appeal did not lie in this case; and we are clearly of that opinion, that an appeal does not lie.

An appeal is given by the 14th section, which provides, "that, if either party in a case to the amount to which jurisdiction is given to the County Court by this act, and to the amount therein by this act, shall be dissatisfied with the determination or decision of the court in point of law, he may be at liberty to appeal to the Superior Courts." Jurisdiction in this case is not given by this act alone; and we are of opinion that the clause applies only to cases which are to the amount given by that act, *i.e.*—above 20*l.* and not exceeding 50*l.* The clause by which jurisdiction is given to the judge by the mutual agreement of the parties is not the clause on which the appeal lies. In the first place, there is an appeal given in the clause, the 17th section, in all cases in which the title to land, whether of freehold, copyhold, leasehold, or other tenure, or any title to tolls, market, or other franchise, shall be in question, "by consent, jurisdiction may be given in these cases; but it is perfectly clear that in any way, construing this act, an appeal is given against a decision on any question of title by the County Court judge. There is no reason why an appeal should be allowed where the parties gave, by consent, jurisdiction to the judge in a matter of that amount; and where, if an appeal would lie in that case, it would not lie in a case of a matter of title to land, to toll, market, or fair. Now, if you look to the sense and reason of the thing, there is great reason for giving an appeal to one of the dissatisfied parties, where the jurisdiction is compulsory, and

jurisdiction to the County Court judge. appeal will be dismissed; but not with costs.

*Appeal*

[(a) Since the decision of the above case, the Legislature has thought it expedient to provide for a power of appeal. It has, however, been thought desirable to account of the sound principles of construction which the learned judge has laid down in the above case, and the statute referred to is the 17 Vict. c. 16 (passed the 2nd June, 1853) amend the Act of the 13 & 14 Vict. c. 61; and the 15 & 16 Vict. c. 61, as amended by the 2nd and 3rd sections of the act of the 17th section of the said first-mentioned act, in consequence of the agreement of the parties, shall be lawful when both parties shall desire that the decision of the County Court shall be final, to exclude such right of appeal, by expressing such their desire in writing, directed by the said 17th section to be filed with the clerk of the County Court.

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## COURT OF EXCHEQUER

*January 23, 1854.*

HARRIS AND ANOTHER v. DREESON

*County Court appeal—Right of appeal where the original amount recovered is less than 20l., but the amount recovered is more than 20l.*

12*l.* only, any jurisdiction to hear an appeal? The demand for a sum over 20*l.* but the court had only awarded 12*l.* ARKE, B.—Do you mean to contend, Mr. Udall, that if a plain-claims 50*l.* and the judge of the County Court should only ord him 5*l.*, he would have no right to appeal?]

Udall.—Yes, or a plaintiff may always, if he pleased, give him- a right of appeal by claiming more than 20*l.* in the plaint, ough he very well knew at the same time that he could not ver, and was not entitled to anything like so large a sum.

ARKE, B.—The 13 & 14 Vict. c. 61, s. 14, states that either ty in any cause of the amount to which jurisdiction is given to County Court by that act, &c., may appeal; and by sect. 1 the ediction is extended to the recovery of any debt, damage, or and not exceeding the sum of 50*l.*, and to all actions in respect reof, except, &c. I think you may proceed to argue the case. The case was then argued, but ultimately sent back to be ended.

HARRIS AND  
ANOTHER  
v.  
DREEMAN.  
—  
1854.  
—  
Appeal.

## JUDGE'S CHAMBERS.

March 1, 1854.

(Before Mr. JUSTICE CROMPTON.)

MARSDON v. WARDLE.

*Prohibition—Title to land—When prohibition may issue.*

on a trial in a County Court to recover the amount of a promissory note given by the defendant to the plaintiff; the defendant contended hat the consideration failed, inasmuch as the note was given as a de-osit of part payment of the purchase of lands and premises, the title o which proved to be imperfect. The judge, however, gave judgment or the plaintiff, and execution issued, whereupon the defendant's goods ere seized, but, at the instance of the defendant they remained unsold. Upon an application for a prohibition on the ground that a question f title to land was involved:

1<sup>st</sup>, that the application was not too late, as something still remained to e done in the action.

2<sup>o</sup>, that the action involved a question of title.

THIS was an action brought by Thomas Marsden against James Wardle, in the County Court of Staffordshire, holden Leek, upon a promissory note for 50*l.* made by the defendant.

to show cause why a prohibition should not issue that a title to land came into question.

*Milward* now showed cause.—First, the application since execution has already issued. Prohibition is execution, unless the want of jurisdiction appears in the proceedings. Secondly, it does not appear that it has arisen in this case. The action is on a promise *prima facie* within the jurisdiction of the County Court. The case may have been decided irrespective of title. The defendant has acquiesced in the jurisdiction of the County Court. The bailiff took possession of his goods. The plaintiff has paid the debt, costs, and additional charges. The plaintiff would consent to postpone the sale, which the defendant's affidavit is defective, in not stating that the writ was taken to the jurisdiction of the court before the County Court.

*Morgan Lloyd*, contra.—As to the first objection, so long as there remains anything to be done will issue. In *Jones v. Owen* (18 L. J. 8, Q. B.) was granted even after complete execution; and, for recovering possession of a tenement, a writ is awarded. In the cases where the application has been made after execution was complete, and there remained nothing to be done, a prohibition could attach. *Re Poe* (5 B. & Ad. 68) a prohibition to a court martial, and, as sentence had been executed, but the court also dissolved, the Queen's Bench held that the application was too late; and all the other cases where the application has been to prohibit an execution explained on the same principle. Secondly, it is quite clear from the affidavits that the real question in the County Court was not the consideration for the promissory note that depended upon whether the plaintiff had a land purchase. It follows, therefore, that a



The court, and nothing short of an agreement according to the provisions of 13 & 14 Vict. c. 61, s. 17, can give jurisdiction where question of title is involved. The cases in which consent has been held to confer jurisdiction are those in which the want of jurisdiction has arisen from some collateral fact, and not where the objection in the action is one which the court has no jurisdiction to try. ROMPTON, J., having consulted Parke, B., said:—As to the imaginary objection the rule is, that it is not too late to apply for a prohibition so long as there remains anything to be done. As to the other questions, I shall look into the affidavits.

*Order for a prohibition granted on the following day.*

MARSDEN  
v.  
WARDLE.  
—  
1854.  
—  
Prohibition—  
Title.

## COURT OF COMMON PLEAS,

*November 11, 1853, and January 23, 1854.*

**THE MANCHESTER, SHEFFIELD AND LINCOLNSHIRE RAILWAY COMPANY, Appellants, AND WALLIS AND ANOTHER, Respondents.**

*County Court appeal—Non-liability of railway companies to fence as against the cattle of persons who are not occupiers of adjoining land.*

*The cattle of the plaintiffs, without any fault on their part, strayed on a public road running alongside the railway of the defendants, and through a defect in their fences, got upon the railway and were killed.*

*Railway Clauses Act, 8 Vict. c. 20, s. 68, enacts, that "the company shall make, and at all times thereafter maintain, the following works for the accommodation of the owners and occupiers of lands adjoining the railway (that is to say), also sufficient posts, rails, hedges, ditches, walls, or other fences, for separating the land taken for the use of the railway from the adjoining lands not taken, and protecting such lands from trespass, or the cattle of the owners or occupiers thereof from straying thereout, by reason of the railway, together with all necessary gates made to open towards such adjoining lands, and not towards the railway, and all necessary stiles."*

*It is held that a railway company is only bound to fence as against the occupiers of adjoining lands; that a public highway running alongside a railway is "adjoining land not taken" within the meaning of the above section; but that the owners of cattle straying on a highway, and being wrongfully there, are not occupiers of the highway so as to cast an obligation upon the railway company to maintain a fence against their title.*

*It is held, that if the cattle had been passing rightfully along the highway, and had got on the line through a defect in the company's fences, the*

quence of the said defendants, their agents or servants, in not keeping open a gate and other openings leading on to the station or near to the said station at Torksey, in consequence of their negligence and default the said horses got upon the railway of the defendants, and were killed or otherwise injured by the engine and train belonging to the said defendants, and the plaintiffs seek damages of 5*l.*, being the amount paid, incurred, or expended by the plaintiffs in and about doctoring and attending upon the said horses, one of them, after they were so injured and hurt.

The case came on to be tried before John Smith, Esq., the judge of the said court, and on the 13th July last, when the following facts were proved:—That on the 13th January last the plaintiffs, who are farmers in the parish of Torksey, in the county of Lincoln, are in possession of a close in the plaintiffs' occupation, in which a public highway passes. At each end of the close there are gates to prevent the cattle, grazing in the close, from straying out of the close, and these gates are continuous with and form part of the plaintiffs' fence. On the day in question it is proved that the east gate, leading to the village of Torksey, was open by some person or persons using the highway, and the plaintiffs' horses in consequence went through the gate upon the highway leading to the village of Torksey. The station-yard from the said east gate of the said close, is a public station-yard of the defendants at Torksey. The gate is constructed as to swing backwards and forwards, and is not to remain open unless propped so as to keep it open, and is ever, frequently propped open during the day, but is closed at night. The horses strayed through the gate from the day in question into the station-yard. from

taking down the rail for the purpose of carrying or carting anything from or to the railway), which fence separates the station-yard from the line of railway, to and upon the railway, where they were killed by the passing of a goods train. The plaintiffs on cross-examination admitted, that he believed that if the gate the plaintiff's close (which he had no doubt had been left open for travellers using the high-road through the said close) had been shut, the accident would not have happened. No evidence was given how or by whose act the gate of the station-yard was opened or left open; but evidence was given that the gate leading into the station-yard was frequently left open, and that cattle had been allowed to stray through it, and that defendants had been warned not to leave it open, and that it had been kept shut since the death of two horses were killed. Upon the above state of facts it was contended, on the part of the plaintiff, that the defendants were liable to make good the loss of the horses, by reason of the alleged negligence in permitting the gate of the station to remain open, and the defect in the fence dividing the station-yard from the line; and the part of the defendants it was contended that there was no evidence to go to the jury, inasmuch as, admitting the facts proved by the plaintiffs, the defendants were not liable.

The learned judge, however, having refused to nonsuit, the advocate for the defendants addressed the jury, and contended that there was no negligence nor any breach of duty on the part of the defendants; that the accident was occasioned by, and directly attributable to, the negligence of the plaintiffs in not keeping the gate of their field closed; and that they were not entitled to recover. The learned judge put two questions to the jury; first, whether they were of opinion that there had been negligence on the part of the defendants; and that the injury of which the plaintiffs complained was to be attributed to their negligence; and secondly, whether the plaintiffs had been guilty of any negligence which contributed in any way to the accident. The jury found that the defendants had been guilty of negligence, but that the plaintiffs had not been guilty of any negligence which contributed to the accident, and found a verdict for the plaintiffs, with 35*l.* damages.

The defendants, being dissatisfied with the decision and with the judge in point of law, appealed, and contended that there was no evidence which ought to have been submitted to the jury; that the ruling and decision of the judge were and each of them was erroneous.

*Addison*, for the defendants (appellants.)

*Gray* for the plaintiffs (respondents.)

The arguments and cases sufficiently appear from the judgment of the court.

JUDGMENT—*January 23.*

JERVIS, C. J.—This case, which was argued before my brothers Maule, Williams, Cresswell, and myself, last term, was an appeal from a decision of a County Court judge. After the finding of the jury, we must assume that the cattle of the respondents, without any fault on the part of the respondents, strayed on a

MANCHESTER,  
SHEFFIELD,  
&c., RAILWAY  
COMPANY

v.  
WALLIS AND  
ANOTHER.

1854.

*Appeal—  
Liability of  
Railway  
Companies to  
fence.*

fence.

for the accommodation of the owners and occupiers adjoining thereto, that is to say, amongst other things, rails, hedges, ditches, mounds, or other fences taken for the use of the railway from the land taken, and protecting such lands from trespass, and owners or occupiers thereof from straying thereto by the railway, together with necessary gates made to adjoining lands, and not towards the railway, or over the stile." Certainly this section makes a very important provision for the protection of the public where a railway crosses a public highway; but, nevertheless, it is clear that it is not intended to apply to such a case as this; for, in this section which casts the obligation to fence a railway across a highway, the highway, therefore, is to be considered to be a public highway, and not a private close, and the same construction must be put upon the words, whether that adjoining land be a public highway or a private close. What then is the nature of the obligation imposed by this section? They are bound to keep the cattle of the owners and occupiers of the land taken from straying on to the railway. *Rickets v. India Docks and Birmingham Junction* (21 L. J. 100). The court has already determined that the obligation imposed by this section, is the same as it would be at common law if they had been bound by prescription to fence; in other words, they are only bound to fence against the cattle of the owners and occupiers of the land. Were, then, the cattle of the respondents killed, the cattle of the owners or occupiers adjoining the railway? We think they were not. *Dovaston v. Payne* (2 H. Bl. 527), appears to be in question. Whilst the cattle are passing along a highway according to the dedication of the owner

se and the road, because the cattle were wrongfully on the road, and the owner of those cattle was not therefore occupying it so as to cast any obligation upon the distrainer. Applying the decision and the principle established to the present question, we are of opinion that the owners of the cattle, the respondents, whilst the cattle were straying on the road, were not occupying the road, and that therefore there was no obligation upon the appellants to maintain a fence against them. If, then, there was no obligation to maintain a fence against the respondents' cattle, the appellants are guilty of no wrong in omitting to do so. There is no comment that the railway was conducted improperly; the only comment is that the fence was not sufficient. The Legislature, with full knowledge of the danger of railways, has cast on them a limited obligation only, and we cannot enlarge it merely because public safety may be endangered. This distinguishes this case from the cases cited. In *Fawcett v. The York and North Midland Railway Company*, 20 L. J. 222, Q. B., the company were required by express statute to keep a gate closed across the road; under such circumstances, they were guilty of a wrong in omitting to do so. In *Bird v. Holbrook*, 4 Bing. 626, it was decided, on the ground that it was unlawful to set up spring guns, and therefore the defendants were liable, although the plaintiff was a trespasser. In *Ward v. Ward*, 19 L. J. 195, C. P., was determined on the point that an area close to a public highway, into which the plaintiff fell, was a public nuisance. If the appellants had been guilty of a wrongful act, there are many cases to show that the respondents would not lose their remedy merely because the cattle were trespassers. In this case there was no wrongful act, and the obligation to repair does not exist, the cattle not being trespassers, the owners of them, therefore, not occupying any part of the adjoining lands in the language of the act of Parliament. We therefore think the appeal must be allowed, with costs.

*Judgment for the appellants, with costs.*

MANCHESTER,  
SHEFFIELD,  
&c. RAILWAY  
COMPANY  
v.  
WALLIS AND  
ANOTHER  
1854.

*Appeal—  
Liability of  
Railway Com-  
panies to fences.*

*Landlord and tenant—Sale of farming stock—56*

*The 11th section of the 56 Geo. 3, c. 50 (An Act to r  
Farming Stock taken in Execution), is not confined  
stock taken in execution, but is general, and exten  
farming stock, and prohibits the removal of hay,  
from off the farm.*

**T**HIS was an appeal from the County Court held at Derby. The action was brought value of the straw of a certain crop of wheat sold farming tenant to the defendant by auction, and n cution, and removed by the defendant and no notwithstanding notice that, by the tenant's leas turnips, &c., the produce of the land, were to be land. The action was brought under the 56 Ge which enacts "That no assignee of any bankrupt o debtor's estate, nor any assignee under any bill o purchaser of the goods or crops of any person or or employed in husbandry, or any land let to farm or dispose of any hay, straw, &c., or any other lands, or any manure, compost, &c., or other dr for such lands, and being thereon, in any other m other purpose than such bankrupt, insolvent debi son so employed in husbandry, ought to have tak posed of the same, if no commission of bankruptcy no such assignment or assignments had been o made."

The learned judge was of opinion that the 11th section of the act, confined to cases of sale

law on the land from a tenant ought, at least, to suspect the removal of it is contrary to the lease. (He was stopped.) *Manisty, contra*.—The act is by its title confined to sales of stock under an execution. So is the 11th section. Bankruptcy and insolvency are executions as well as suits. The sheriff realises by bill of sale. Then “any purchaser” means any purchaser within the scope of the act. The 11th section, in fact, prohibits the sheriff from doing that which the first section prohibited the sheriff himself from doing.

WILMOT, App.,  
AND  
ROSE, Resp.  
1854.  
Landlord and  
tenant—  
Farming stock.

MR. CAMPBELL, C.J.—The nonsuit is wrong, and must be set

It proceeded on the notion that the 11th section was confined to cases of a sale under an execution. That is not so. The preamble so; and if there were any reasonable doubt about the construction, we should refer to both for the purpose of ascertaining the real intention of the Legislature. There is, however, no reasonable doubt about the true construction. The 11th section exceeds the title and preamble; and is a bad, though I am sorry to say a fair, specimen of our legislation, and we must give full force to it. Mr. Manisty suggested that the case of a sale under an execution was alone contemplated. Now, by the very language, the case of titles accruing under the bankrupt law was provided for: and such titles are not derived from a sale under an execution. Then there is the case of any assignee under any bill of sale—not, as Mr. Manisty suggested, under any bill of sale from a sheriff under a writ *fi. fa.* Lastly comes the case of “any purchaser of the land.” The enactment, therefore, is clearly general; it must be so; and the judge was wrong in nonsuiting the plaintiff.

MR. LE, J.—I also think that the nonsuit was wrong. The question is whether the 11th section of this statute prohibits the purchase of crops on the land from the tenant under a lease from which the hay and straw, contrary to the restrictions of the statute, are taken off.

The words are general and unqualified, and I do not discover any reason for narrowing the interpretation of them. Mr. Manisty suggested that the 11th section was intended to prevent the purchaser from the sheriff from doing that which the first section prohibits the sheriff himself or his officer from doing; but the 4th section had provided for that; so that, unless the 11th section be read as a restriction, it is practically inoperative.

MR. COMPTON, J., concurred.

*Judgment for appellant.*

(Before MR. JUSTICE COLERIDGE

HARRIES v. HANDS AND ANOTE

*Replevin—Jurisdiction—Prohibition*

*Semble, that the jurisdiction of the County Courts is only to cases where the distress was for rent in arrears *faisant*.*

MORGAN LLOYD moved for a rule to sh prohibition should not issue to restrain t Carmarthenshire County Court from proceeding t replevin which had been entered in his court. had distrained three cows of the plaintiffs under the Tithe Commutation Acts, for a proportionat expenses of apportioning the tithe-rentcharge cert missioners to be due to one of the defendants in in the occupation of the plaintiff. It is, therefore the distress was neither for rent in arrear, or for and the question will therefore be, whether the j new County Court in replevin extends to any c first mention of the action of replevin by name in c. 95, occurs in the 119th section, by which it enacted, that all actions of replevin in cases of d arrear, or *damage faisant*, which shall be brougl Court, shall be brought without writ in a cour act." By the 121st section, provisions are made f such actions of replevin, thereby clearly confining t actions of replevin in case of distress for rent or and the 194th and 195th Rules of Practice are, i to the same limits. It follows, therefore, that the



lity of a distress; and the words "as altered by this act," as altered from 40s. to 20l. Besides, it is quite clear that Legislature did not contemplate the transfer of all the jurisdiction of the old County Court into the new, since it proceeds to t (s. 4), "that for all purposes, except those which shall be in the jurisdiction of the courts holden under this act, the County Court shall be holden as if this act had not been passed." It remains to see whether the 58th section applies. The words of the section are very general: "All pleas of personal actions, where the debt or damage claimed shall not exceed 20l.;" but it comes the proviso, excepting out of the jurisdiction all actions which title to a hereditament, &c., shall be in question. This proviso, and the enactments of the 121st section, are inconsistent; it has been accordingly held, that the former does not apply to actions of replevin, and the County Court has jurisdiction in replevin for rent in arrear, *damage faisant*, though title be in question: (*Re Lancashire County Court*, 1 Cox & Mac. 170; *Tubby Stanhope* 5 C. B. 790; 1 Cox & Mac. 105; *Reg. v. Raines*, 11 J. 223, Q. B.) And it has been holden by the Court of Exchequer that actions of replevin are not within the 13 & 14 Vict. c. 61, by which the jurisdiction of the County Courts is extended to 100l.: (see *Mungeam v. Wheatley*, 6 Exch. 88.)

CLERIDGE, J.—You may take a rule to show cause.

The rule was afterwards made absolute, no cause being shown.

*Rule absolute.*

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v.  
HANDS  
AND ANOTHER.  
—  
1854.  
—  
*Replevin—  
Jurisdiction—  
Prohibition.*

(Before MR. JUSTICE COLERIDGE)

MITCHELL v. HENDER.

*County Courts—Costs—Concurrent juris*

*A surgeon and accoucheur carries on his business within the meaning of sect. 128 of the 9 & 10 Vict. c. 95, in that district where he has his patients, though in fact he may be dwelling in another district. A., a surgeon and accoucheur, who lived within the County of B., was sued for a debt in this court (Queen's Bench) in an action which arose in the County Court of C.; as returned for less than 20l., the plaintiff applied, under 15 & 16 Vict. c. 54, for a rule for his costs. It was held that A. attended patients daily within the jurisdiction of the County Court of C.:*

*Held, that this was a carrying on of his business within the meaning of sect. 128 of the 9 & 10 Vict. c. 95, and that the plaintiff, therefore, was not entitled to his costs.*

MAYNARD moved in this case, under sect. 4 of the 9 & 10 Vict. c. 54, for the costs of this action, on the following circumstances:—This was an action brought in this court from the defendant the sum of 10l. 16s. 8d. due to the plaintiff for work done in a certain mine in which the defendant was the holder. The cause was tried under a writ of Habeas Corpus, when a verdict was given for the plaintiff for the above amount, and it was sought to set aside the verdict within the exception of sect. 128 of the 9 & 10 Vict. c. 95 (County Courts Act), upon the ground that at the time the action was brought, the defendant did not dwell or carry on his business within the jurisdiction of the County Court of C. It was held that the cause of action arose; and it was alleged in the

him the jurisdiction of the Launceston County Court and that was the surgeon of the Launceston union.

*Maynard* contended that attending patients within the district Launceston, yet living within the Liskeard district, was not a trying on of his business within the meaning of the act: (*Rolfe Learmouth*, 14 Q. B. 196; *Buckley v. Hann*, 5 Ex. 43; *Stephens Derry*, 16 East, 147; *Gray v. Cox*, 8 East, 236.)

*Collier*, who showed cause in the first instance, contended that ending upon patients as a surgeon and an accoucheur was a trying on of a business within the terms of the act.

*COLERIDGE, J.*—I am of opinion that this rule ought to be used, and upon the ground that the defendant carries on business within the jurisdiction of the County Court of unceston. In looking at the language of the affidavits, care should be taken that they are framed with such strictness that it should appear that there has been no evasion of the act of Parliament, and that it has been substantially complied with. Now the defendant says that, at the time the action was brought, he was trying on the business of a surgeon and accoucheur at Launceston, he was attending, and now attends, at Launceston, several patients, being resident within the several parishes named within the jurisdiction. That is an averment that he is in the daily habit attending patients being resident within that place, and we should be trifling with language if any other construction were put upon it. Then, as to the construction of the act of Parliament: the words are, "where the cause of action did not arise wholly or on some material point within the jurisdiction of the court within which the defendant dwells or carries on his business at the time the action brought." The limit given for dwelling is, within the jurisdiction of the court; and it is the same as carrying on his business—if it is within the jurisdiction, that is sufficient. Now we must undoubtedly be something personal, and not by agent merely; the dwelling must be personal, and so must be the trying on of the business. Suppose, however, the nature of the business is to be moving about—that would be a carrying on of business in doing its work and effecting its objects. What does the defendant say here? He says he is in daily attendance upon patients within the jurisdiction. That being so, let us see the cases that have already been decided. The first is that of *Rolfe v. Learmouth*, 14 Q. B. 196. This was the case of the officer of the Lord Chancellor, namely, the *deputy sealer of the writs*, whose duty it was to attend upon the Lord Chancellor wherever he might be; and it was there held that his was not a business carried on at any fixed place—it was an office which had no reference whatever to locality. The next case is that of *Buckley v. Hann*, 5 Ex. 43, which was decided upon the authority of *Rolfe v. Learmouth*, and in which it was held that a clerk in the Admiralty who, as such attends daily at an office within the city of London, was not a person who carries on his business there within the London and Middlesex Debts Act. In the case of *Stephens v. Derry*, 16 East, 147,

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*v.*  
*HENDER.*

1854.

Costs—Con-  
current juris-  
diction.

was occupied by others; and it was held that it did not stand within the meaning of the act; but that it had no bearing upon the present one. Upon the whole, it ought to be refused.

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COURT OF COMMON PLE.

May 10, 1854.

STOKES v. GRISSSELL.

*Costs—Dwelling of defendant—Distance of—Carry on business—Sufficiency of affidavit.*

*Upon an application by a plaintiff, for costs, under 15 & 16 Vict. c. 54, his affidavit stated "that the defendant did not know of the defendant carrying on any business in the district, and did not believe that the defendant carried on business within the district; that he had made inquiries, but had not heard that the defendant did carry on his business at any place within the district." Held, in the absence of any affidavit by the defendant, that the affidavit of the plaintiff was sufficient. The residence of the defendant was 273 yards more than the distance of the district.*

such order should not be set aside, upon the grounds,—1st, that the defendant did not reside more than twenty miles from defendant. 2nd, that the defendant carried on his business in the jurisdiction of the Southwark County Court.

It appeared that the defendant's residence was at Norbury-park, which was not within the Southwark County Court district, but was 273 yards more than twenty miles from the plaintiff's residence when measured by the high road, but only nineteen miles if measured in a straight line.

The cause of action arose within the district of the Southwark County Court; and it was contended, on behalf of the defendant, that he carried on his business at Stangate Saw-mills, which are within that district. The plaintiff's affidavit was to the effect that the cause of action did not, nor did any part of it, arise within the district in which the defendant carried on his business. That the defendant's office for receiving rents was in Palace-yard, Westminster. That the deponent had heard and understood that the defendant had retired from business. That the deponent did not know of the defendant carrying on any business within the district, and did not believe that the defendant carried on his business within the district. That he had made some inquiries; but that, although he had heard that the defendant *did* carry on his business at Stangate Saw-mills, he had heard that he had ceased to carry on his business altogether. There was no affidavit made by the defendant himself.

*Justice* showed cause.—Cresswell, J., held that the twenty miles was to be measured by the road, and not in a straight line or as the crow flies. The County Court bailiff's fees are regulated by the distance he has to go. The question is not how far one is from another, but what distance he has to go. [JERVIS, C.J. Then a man may one day be without the twenty miles, and one day within, by altering the road.] *Reg. v. Saffron Walden* (9 Q. B. 76) has been relied on by the other side. That was a decision on the Statute Law Act (4 & 5 Will. 4, c. 76, s. 68), by which it was enacted that no person should be deemed, adjudged, or taken to be in any settlement gained by virtue of any possession of any estate or interest in any parish, for any longer or further time than that person should inhabit "within ten miles thereof." Lord Mansfield in that case says, "Some statutes furnish one mode of measurement, some another. In *Leigh v. Hind* (9 B. & C. 774), my learned judge, my brother Parke, thought that the natural mode of estimating the distance was as the crow flies; but there, in reference probably to the object of the contract, the measurement by the nearest accessible route was adopted. Here we have left very much at large, and without materials for judgment. We find no words referring to any particular object. We have therefore to lay down a fixed and absolute rule. Now, abstractedly, the most reasonable rule appears to be that approved of by my brother Parke, namely, a measurement by a direct line. By this we shall avoid the practical difficulty of a settlement being good

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and enacts that the distance shall be understood of seven miles as measured in a straight line plane, &c. [WILLIAMS, J.—Have you looked Corporations Act? I rather think that is the c 2 & 3 Vict. c. 47, s. 2, enacts that it shall be Majesty to order that any place, &c., which is no miles distant from Charing-cross, in a straight line to and form part of the Metropolitan Police District is silent. *Leigh v. Hind* was referred to. [MAYARD frost a man might wake in the morning breaking a covenant.] The Legislature had regard the plaintiff was to go to sue, the bailiff to serve and all proceedings. [WILLIAMS, J. referred to 54.] (Hon. G. Denman, in support of the rule, *re v. Kinnier*, 4 Ex. 776.) On the other question, review the decision of a judge on a matter of fact. I apprehend that when a judge of the court has jurisdiction, the court has an appellate jurisdiction matters of fact or of law.] *Maddocks v. Phillips* (370), was referred to. In cases of certificates for cannot review what the judge has done. [MAYARD the judge exercises the authority of the court, it may be reviewed by the court. Here the action and the judge in giving costs is acting as a judge is therefore constructively exercising the jurisdiction and when he does that, the court may on appeal 15 & 16 Vict. c. 54, s. 4, was referred to. [MAYARD under the act for the abolition of arrest on *mesne* called, that a judge at chambers may make an order. I apprehend an order of that kind may be made. WILLIAMS, J., referred to *Hopkins* 15 & 16 Vict. 402.)

ngly decided, it was a miscarriage in point of law. He referred *Teggin v. Langford*, 10 M. & W. 556, and sect. 4 of 15 & 16 c. 54. [MAULE, J.—Business must, I apprehend, mean trade.] He referred to *Latham v. Spedding*, 20 L. J. 302, B. [JERVIS, C. J.—You take the plaintiff's affidavit, and say there were no materials to warrant the order. MAULE, J.—The point is that of proving a negative. He proves it sufficiently with reference to this case, that he verily believes the place of business in the jurisdiction does not exist.]

JERVIS, C. J.—It is unnecessary to hear Mr. Denman on the first point, because we are against him on this. As at present based upon that matter, I am in his favour; but do not wish to give any opinion which should bind the court. I should hold, that distance is to be measured in a right line. But the defendant failed in his first point. All the affidavits being before the court, we are bound to look at all the facts. It does not appear that the defendant has made out any answer that would be sufficient, if he were successful on the other point; and it is admitted that both points must concur in being found in favour of the defendant, in order to entitle him to succeed. If the parties are within the place, as I think they are, yet there is no place of business. It is distinctly stated in the affidavits, as far as can be reasonably ascertained. I think Mr. Grissell was formerly in business, and it is sworn that he *did* carry on business; but the affidavit states that the plaintiff verily believes that he does not carry on business, and it is established to my satisfaction that he has ceased to trade; so the other matter does not arise. What my brother Maule says is quite true, as to the distinction between proving the affirmative, when you can speak to a fact; and a negative, when you can only speak to your belief.

MAULE, J.—I agree with what has fallen from the Lord Chief Justice on both points. I think that the true construction as to twenty miles is like that put upon similar words by Parke, B., in the case of *Leigh v. Hind*, in the Queen's Bench, that the words do not have two senses, but one, subject to this, that if that sense led to a clear contradiction or inconvenience, then they would not be interpreted in that sense, because that would have been visible to those who used them; but that is not so here, because the convenience is greater in using them in their ordinary sense than in any other. I think that the judge's opinion was expressed with his usual accuracy when he says that he should have thought that the proper mode of measuring the distance would be to take a straight line from house to house, *in common parlance*, as the crow flies. In a straight line is the natural and obvious meaning of these words. With respect to the other point, it is very clear that the plaintiff, having sued Grissell, seeks to recover costs on the ground, amongst others, that the defendant does carry on business within a certain district. He says all that has been said, namely, "I do not believe he carries on business. I do not know of any; I have made some inquiry, and learn that,

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answer. Mr. Grissell could put the matter out not. With regard to the second ground, the arise, and I beg to give no opinion.

CROWDER, J.—I am also of opinion that the discharged on the first ground. I give no opinion ground. On the first, the affidavit that the par the defendant carries on business; that he knows of no business—called for a decisive answer to me, as none was given, but the defendant has which is very insufficient, that we ought to as the plaintiff says he believes.

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## COURT OF EXCHEQUE

*April 27, 1854.*

CHAPLIN v. LEVY.

*Costs—City of London Small Debts Act—  
Under the City of London Small Debts Act (15 & 16 V*



early within the terms of the above statute, and might have been sought in the Sheriff's Court of the city of London. It was tried at Liverpool, at the Autumn Assizes, 1853, before Erle, J., and a verdict given for 32*l.* only. No certificate for costs was applied for at the time; but, a rule for a new trial having been obtained and disposed of in Hilary Term, 1854, the defendant applied on the 6th February to Platt, B. for a suggestion by a summons with a stay of proceedings. Pending this summons, the defendant applied to Erle, J. for a certificate, under the 119th section of the act, that the case was fit to be brought in the superior Courts; and, the validity of this certificate being in question, the learned judge ordered the case to stand until the present motion could be made.

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v.

LEVY.

1854.

*Costs—Small**Debts Act—**Certificate.*

*Pulling* contended that, on the construction of the above two sections, the judge's certificate to give the plaintiff his costs, in a case where he might have sued in the City Court, must be given forthwith. The general words of the 119th section were exactly controlled by the express word "forthwith," in the 121st section: (*Ex parte Carruthers*, 9 East, 44; Bac. Abr. "Statute," 2.) The two clauses were indeed not intended to stand together. The 119th section was copied from the 9 & 10 Vict. c. 95, § 29, with the substitution of the words *fifty pounds* for twenty pounds; and the two subsequent clauses from the County Court Amendment Act of 1852, by which this original 129th section is repealed.

*Cur. adv. vult.**May 1.*

POLLOCK, C. B., delivered judgment.—This was a motion to set aside a certificate; and the question turned upon this, whether a judge who has tried a cause, a verdict being recovered between 20*l.* and 50*l.*, can certify so as to give the plaintiff his costs—the motion having been tried under such circumstances, that it fell within the act of the city of London, with reference to the trial of causes before the judge of the Sheriff's Court. Upon looking at that act, which probably, like many other acts, was not framed with perfect accuracy, or with reference to all the difficulties that might arise in construing it, we think the Court of Common Pleas put a very correct construction, on one occasion, on one part of it (see *Castrigue v. Page*, 22 L. J. 145, C. P.); and we think that where a verdict is recovered under 20*l.* or not exceeding 20*l.*, it is necessary for the judge to certify "forthwith" (that is the expression used in respect of the matter), yet where the verdict is between 20*l.* and 50*l.* that there he may do it at any convenient time after the trial is over. We think, therefore, the certificate of brother Erle was correct; and that there ought to be no rule to set aside the certificate.

*Rule refused.*

*Right of support of soil.*

*Where the defendant contracted with certain persons on his land, and in excavating for the foundation threw down the plaintiff's yard-wall, and injured the plaintiff's house which adjoined the defendant's premises, the plaintiff not being an ancient house:*

*Held, that the plaintiff had no right to the support and that therefore the defendant was not liable. The contractor's workmen removed the brick had so fallen without the direction or permission of the defendant. Held, that the defendant was not liable in trover for the materials.*

**T**HIS was an appeal against the decision of the Whitechapel County Court of Middlesex. that this action was brought to recover a sum of money from the defendant under the following particulars of demand, delivered by leave of the judge: that the defendant on or about the 1st day of August 1871, wrongfully, carelessly, negligently excavated and carried away the earth and soil adjacent to a certain dwelling-house, with the appurtenances thereof, and known as No. 8, Mountford-street, Whitechapel, then and still being in the possession of Amos I. Nicholls, and to which the said Henry Nicholls then was and still is entitled, and which is a part of the said dwelling-house, with the appurtenances thereof, and the land on which the same was built and stood, by means of the defendant's mere wrongful, and improper conduct, in and about the premises

ickness, and to the full depth of such excavation, and with and sufficient materials in that behalf, and in a workmanlike substantial manner, or in any manner whatever; whereby and son whereof the said wall and the said water-closet fell, and id dwelling-house and coal-house sunk, and the several other thereof respectively cracked, and the said dwelling-house coal-house have become and are in danger of falling and ing dilapidated. And for that the defendant carried away onverted to his own use the bricks and materials of which id wall was built, by means of which several premises the ionary estate and interest of the said Henry Nicholls of and said dwelling-house and premises has become and is greatly d and depreciated."

action was tried before a jury, and a verdict was returned : plaintiff, damages 23*l*. being 20*l*., in respect of the injury to the ff's house, and 3*l*. for the conversion of the materials of the

It appeared upon the trial that in April, 1851, the plaintiff used the house, yard and outbuildings No. 8, Mountford-street, ey were at the time of the commission of the alleged nces in the possession of one Amos Harrold, as tenant of the ff. The house was built in the years 1844—45. The de- it was, at the time of the commission of the acts complained possession of certain lands next adjoining the plaintiff's. In nber, 1853 the defendant contracted with one Edward Carter ld a warehouse on the land in his the defendant's possession. workmen engaged for that purpose were employed and paid rter, the contractor. In excavating the defendant's land, consisted of made ground close to the plaintiff's outbuild- nd yard-wall, to the depth of seven or eight feet, for the e of obtaining a foundation for the wall of the defendant's ouse, the wall of the plaintiff's yard, which stood upon the ff's premises, was disturbed and thrown down, and the walls : plaintiff's house were injured. The bricks and other als of the fallen wall were carted away by the workmen em- by Carter, without the plaintiff's permission. The de- t gave no directions to the workmen employed on his land, ave no orders for the removal of the materials of the old hich had fallen. It was contended on the part of the ff, that the injury complained of was occasioned by the en employed in building the defendant's warehouse, having up the plaintiff's outbuildings and yard-wall in an unwork- ce and insufficient manner; the defendant contending that jury was occasioned by the bad construction of the plaintiff's dings and yard-wall. Upon these points the evidence was ting. Upon the above facts, the learned judge directed the jury : the defendant, for whom the new warehouse was erected, was session of the land adjoining the plaintiff's house and pre- the defendant was answerable for the wrongful acts of any : allowed by the defendant to go upon the defendant's land : purpose of erecting such warehouse, and that the existence

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the plaintiff's wall and buildings, or had carried land materials belonging to the plaintiff, the defendant is liable for the injuries resulting from those acts. The opinion of the Court of Exchequer, is "Whether stated, the direction so given to the jury was correct."

*Bagley*, for the appellant (the defendant below) *The London and North Western Railway Company v. Knight v. Fox*, 5 Ex. 721; *Peachy v. Rowland Overton v. Freeman*, 22 L. J. 52, C. P.

*Edgar*, for the respondent (the plaintiff below) this case came under a different principle than that of the court in the two first-mentioned cases, and they were all distinguishable. He cited 3 Black. Com. tit. "Nuisance"; *Ellis v. The Sheffield Gas Company*, 22 L. T. Rep. 84; *Burgess v. Gray*, 1 C. B. 578.

*Bagley*, in reply.

PARKE, B.—His lordship referred to the case of *1 A. & E. 493*. The ruling of the judge cannot stand; the case must be sent back for a new trial. The plaintiff had no right to support—then he has no right to bring the action. There can be no right to bring the action if the plaintiff can show something that gives him support of the adjoining soil. The present case is the supposed obligation to support the adjoining houses are in operation. I am of opinion that in this case the plaintiff is right, and I do not think the defendant is responsible. The judge says trover will lie for the bricks. I am of opinion that no such action will lie, unless the defendant has taken his desire, took them away; and that is expressly the case.

PLATT, B. concurred.

## COURT OF EXCHEQUER.

May 27, 1854.

M'KELLAR v. J. SUMMERS THE YOUNGER.

*Interpleader summons—Amount of seizure—Jurisdiction of Superior Courts.*

*re, on a plaint in the County Court between A. and B., execution has been issued, under which the goods claimed by C. have been seized, and on notice being given by him, an interpleader summons has issued, the Superior Courts have no jurisdiction to interfere, although the value of the goods seized exceeds 50l.*

In this case a plaint was heard before the judge of the County Court of Kent, holden at Rochester, on 3rd May, between M'Kellar, plaintiff, and J. Summers, jun. defendant, whereby the plaintiff sought to recover 23l. 5s. 3d. and costs; and on the hearing it was ordered that the defendant should pay the amount claimed, and 5l. 1s. 8d. costs. On the same day, a brick-field and garden, the property of James Summers the elder, were sold, and the goods and chattels therein were seized and taken possession of by the bailiff and others of the said court to satisfy said debt and costs, and subsequent expenses. J. Summers the elder then gave notice to the bailiff, that the premises entered and chattels taken were his property. An interpleader summons was then issued. The goods seized were of 400l. value, and consisted of 350,000 bricks in the various stages of manufacture, machinery and plant used in making bricks, horse, van, cart, wheel-hoofs, planks, and other things. No inventory of the goods had been made. The interpleader summons required James Summers the elder, five days before the 7th June, to deliver to the officer a schedule of the goods so claimed, and of the grounds of his claim. On the 6th May, one man had, during the day, remained in possession, and two at night. James Summers the younger had no right in the goods seized. The interpleader summons was entitled in the original cause, and did not show at whose suit it was issued. Forsley now moved for a writ of *certiorari* to remove the interpleader summons, or for a writ of prohibition, directed to the judge of the County Court. The writ of *certiorari* is a common law right, that can only be taken away by express enactment. DEERSON, B.—Yes; but here there is no record: this proceeding is a mere excrescence engrafted on the original plaint, and we

amount of the execution into court, to abide the interpleader summons.

ALDERSON, B.—I dare say the judge will be adopting the best rules of practice; and that has been the course in the Superior Courts.

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## COURT OF EXCHEQUER

June 8 and 15, 1854.

*Ex parte* THOMAS SOUTHGATE, *re* THE GUARDIANSHIP OF THE LEXDEN AND MUNSTER UNIONS  
SOUTHGATE.

*Jurisdiction—Defendant sued in two different capacities. The defendant was sued in the County Court as administrator and as executor of B.; and the judge of the court found evidence that he was not the executor of B., or that the plaintiffs to elect in which character they would sue, and he further refused to call upon the attorney to*

ding further with this plaint. It appeared that a plaint had been issued on behalf of the guardians of the poor for the Lexden and Munster Union, against the defendant, Thomas Southgate, as administrator of John Ingate Southgate, and as executor of Jane Southgate, his widow, for the sum of 17*l.* 1*s.*, paid for the support of certain children of the deceased persons. At the trial the defendant tendered proof that he was not the executor of the widow, and called upon the judge to make the plaintiffs elect in which character they would sue him; but this the judge declined to do, and a verdict was given against the defendant generally, in alleged double capacity of administrator and executor, without distinction as to the amount due from him in each character. The defendant now swore in his affidavit that, although he was administrator of J. I. Southgate, yet he was not the executor of his widow, nor had he ever intermeddled with her goods as *executor de tort*. It was now contended that the judge had clearly acted without jurisdiction. In consequence of the verdict being general, the damages not severed, it was impossible for the defendant to know as to what part he was liable as such administrator, for the fact he had never been brought into court as executor. ALDERSON, B.—However clear it may be that the judge has come to a wrong decision, we can only prohibit a person for acting without jurisdiction.] The judge was here trying two actions in one; and that was an excess of jurisdiction sufficient to enable the court to interfere by prohibition. There is a second ground for the rule. At the trial of the plaint it was objected that there was no evidence that the attorney acting for the guardians of the poor of the Lexden and Munster Union had been authorised to bring the action; and they, being a corporate body, could only be appointed by a resolution passed at their meeting, and which ought to have been proved. [ALDERSON, B.—If the attorney was appointed, it may have been improperly appointed; but we cannot therefore prohibit the judge from hearing the plaint.] It becomes a question whether the plaintiffs were in court at all; and if they were, the cause ought to have been struck out: (9 & 10 Vict. c. 96, s. 9.) [ALDERSON, B.—If a plaintiff in this court had not instructed an attorney to proceed, that would be no ground for a prohibition, but for setting aside the proceedings as irregular; here there is nothing to show that the judge had no jurisdiction.] The judge has tried two plaints in one in different rights; and no appeal can be had, because the amount is under 20*l.*

POLLOCK, C. B.—This may be a very wrong decision; but it is no ground for a prohibition.

ALDERSON, B.—In consequence of the smallness of the sum which the plaint is brought, and the expense of a rule, we ought not to grant you one, unless we are sure it ought to be made absolute.

*Cur. adv. vult.*

*Ex parte*  
SOUTHGATE,  
vs GUARDIANS  
OF POOR OF  
LEXDEN &c.  
UNION  
v.  
SOUTHGATE.  
—  
1854.  
—  
Jurisdiction—  
Prohibition.

#### JUDGMENT.

POLLOCK, C. B.—In this case there was a motion for a prohibi-

should pronounce any opinion. Here the ques-  
perly before the judge of the County Court. I  
ought to have decided differently; but a wro-  
ground for a prohibition. If a judge of a Coun-  
being a matter brought before him, without a pa-  
one way or the other—were to find a verdict again-  
it would be very wrong; but it is no ground for  
There are certain modes in which applications may  
court before a trial, for relief, if the matter be of  
tion; and, by the Act of Parliament, there are  
the opinion of this court after the decision by  
neither the one nor the other. It is nothing but  
to this court; because it is suggested that the  
County Court has decided as he ought not to do,  
a conclusion which he ought not to arrive at. V-  
that that is no ground for a prohibition, and there  
be no rule.



## COURT OF EXCHEQUER.

*January 31, 1854.*

BOX v. GREEN.

*Certiorari—Procedendo—Bailiff.*

*bailiff of a county entered two complaints in the County Court against defendant; one to recover 5l. for an assault, and the other to recover the fine of 5l. imposed by section 114 of the 9 & 10 Vict. c. 95, an assault upon an officer of the court in the execution of his duty, two assaults being one and the same: that these were distinct complaints for 5l. each, and not to be considered one of 10l., and therefore were not removable by certiorari.*

this case two separate complaints had been issued by the plaintiff, who was one of the bailiffs of the Tunbridge Wells County Court against the defendant, the particulars in the first complaint being as follows:—"This complaint has been entered into to recover the fine of 5l., which the plaintiff claims of the defendant for an assault committed upon the plaintiff by the defendant at Spedhurst, in the county of Kent, on the 22nd day of October, 1853." The particulars in the second complaint were for "The fine imposed by the 10 Vict. c. 95, s. 114, for assaulting the plaintiff, one of the bailiffs of the said court, whilst in the execution of his duty, in the parish of Spedhurst, in the county of Kent, on the 22nd day of October, 1853: 5l."

certiorari had been obtained to remove these complaints unto the Court of Exchequer, upon an affidavit which stated that the two complaints were brought against the defendant to recover the fine imposed by the 9 & 10 Vict. c. 95, s. 114, and also damages for assaulting the plaintiff, one of the bailiffs of the court, whilst in the execution of his duty, as alleged by the plaintiff, in the parish of Spedhurst, in the county of Kent, on the 22nd of October, 1853, that the defendant has a good defence to the actions, and upon the trial of the causes certain important points of law were likely to arise, under the provisions of the said act of Parliament, that the plaintiff was the officer of the County Court of Kent, holden at Tunbridge Wells, and in which the said causes were to be tried, and that the defendant could not have a fair and impartial trial of the said causes, owing to the interest of the plaintiff in the said court, &c.

certiorari had subsequently been obtained by the plaintiff calling in L. III.

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is, therefore, prohibited by the 90th section.

MARTIN, B.—The only ground upon which t  
be upheld is that the two complaints are one, but th  
is for a personal assault, and the other is for a fi  
the 114th section of the County Courts Act, s  
within the jurisdiction of the County Court.

## COURT OF COMMON PLEAS.

November 6, 1854.

LEVERSON v. SHAW.

*Costs in the County Courts—Statute 15 & 16 Vict. c. 54, s. 1.**If the scale of costs authorized by section 1 of the 15 & 16 Vict. c. 54, all have come into force, the costs of an attorney in the County Court as between attorney and client, may be taxed according to the method of taxing.*

HIS was an action on an attorney's bill for costs incurred in proceedings in the County Court. Verdict for the plaintiff £47. with leave to the defendant to move to reduce the verdict to £10.

*ush* now moved.—The question arises under the statute of 15 & 16 Vict. c. 54, s. 1, which authorizes the Lord Chancellor to appoint five of the County Court judges to frame a scale of costs charges to be paid to attorneys in the County Courts, to be taxed as between attorney and client, and as between party and party, to be certified to the Lord Chancellor, subject to the approval of three of the superior judges; and the scale of costs charges so approved, altered or amended, shall, from and after the day to be named by such last-mentioned judges, be in force in every County Court; and all costs between party and party, and between attorney and client, shall be taxed by the clerk of the court, but taxation may be reviewed by the judge upon the application of either party; and in no case upon the taxation of the costs between attorney and client shall any charges be allowed not mentioned by the aforesaid scale, unless the clerk is satisfied by seeing under the hand of the client, that he has agreed to pay the further charges, and no attorney shall have a right to recover away from his client, any costs or charges not so allowed on taxation." No scale of costs has yet been approved of, and it is submitted that until such scale is approved of, an attorney cannot recover from his client any costs for work done in a County Court.

MAULE, J.—Under the Attorney's Act these costs are taxable in court either of common law or of equity. This act does not take away the right of the officers of these courts to tax, but authorizes the officer of the County Court to tax after a certain time when it shall have been made. Then, until that scale is made, the old method of taxing must continue to exist.

*Rule refused.*

November 20, 1854.

BLOWER v. HASTON.

*Special case—Interpleader—High bailiff*

*A writ of fi. fa. was executed by the high bailiff of Staffordshire. When he had seized the goods, a third person, and an interpleader summons issued of the high bailiff. The interpleader was determined plaintiff in the County Court, and the judge ordered the interpleader proceedings should be paid by the goods were sold, and the proceeds were paid into court taken out by the plaintiff in that court. He then brought this action for his costs against the defendant Statute 9 & 10 Vict. c. 95, s. 118, enacts that County Court shall adjudicate upon such interpleader summons," "and make such order between respect thereof, and of the costs of the proceedings seem fit, and such order shall be enforced in like manner made in any suit brought in such court."*

*By the 148th rule of practice in the County Courts, "any goods or chattels taken in execution, or the proceeds thereof shall be dismissed, the costs of the bailiff by him out of the amount levied, unless the judge direct."*

*Held that, assuming that the plaintiff could have deducted of the proceeds, having omitted to do so, he had no claim against the defendant, the plaintiff in the County Court. Held also, that such costs are not fees.*

**THIS** was a special case.—The plaintiff was the County Court of Staffordshire, holding

the goods were detained by him till after the trial of the interpleader; that was determined in favour of the defendant, the then plaintiff; and the judge ordered that the costs of the interpleader proceedings should be paid by the claimant. The goods were sold and the proceeds were paid into court, and the money was afterwards taken out by the then plaintiff without deduction having been made by the high bailiff for his costs under the 148th rule of practice, which says that where the claim to any goods or chattels taken in execution, or the proceeds or value thereof shall be dismissed, the costs of the bailiff shall be retained by him out of the amount levied, unless the judge shall otherwise direct. The plaintiff then brought an action for his costs against the present defendant, who had taken the money out of court. And the question for the court was, whether the plaintiff, having admitted to deduct his costs out of the sum levied, could sustain an action for them against the defendant.

*H. Mills* for the plaintiff.—The plaintiff has a right to fees under the statute of Elizabeth, and may bring an action for them; and the right to deduct them does not take away that remedy. By the 118th section the judge may make such order as to the costs of the interpleader as to him shall seem fit. He ordered the claimant in the interpleader to pay the costs of the then plaintiff. The costs of the high bailiff are part of those costs, and he may recover them from him by action. [MAULE, J.—The 118th section does not impose any duty upon the high bailiff; he may take out an interpleader summons or not, as he chooses.] By the 145th and 146th rules show that it is his duty to do so. [MAULE, J.—They do not impose on him any duty.] Sect. 37 gives the bailiff a right to fees generally. The 118th section speaks of the costs of interpleader, and gives the judge the right to say what costs the one party shall pay to the other; and by the practice of the court the losing party pays the costs of the high bailiff. The officers taxed these costs. [MAULE, J.—Supposing a might have brought an action against Mary Collins. Having paid the money over to the defendant, can he bring an action against her?] He earned his fees and has a right of action for them. [MAULE, J.—Having paid the money over to the defendant, under what head of money paid can he recover it back?] As to which he is entitled.

MAULE, J.—They are not fees at all, but costs which the judge has ordered to be paid by Mary Collins. A fee means something to be paid by one person to another for something done for him. But this would be a fee for something done by the plaintiff as a duty to himself.

*Mellish*, for the defendant.—First, the defendant is not liable to pay at all. By the 118th section the judge may order that the costs should be paid; or that they should not be paid. He has not ordered the defendant to pay them, and the plaintiff cannot recover them from him. Secondly, having paid the money over, he cannot recover it back. The 148th rule cannot give any

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to deduct his costs from the proceeds. But the costs of doing what he did in executing the judgment I decide.

MAULE, J.—Assuming the right of the plaintiff to his costs, if he had done that the court would have had a residue. He has not done so though knowing all of the case. He has not applied to the court, or to the court to distribute the money to other persons; to recover his costs from the defendant, the plaintiff's suit. This does not come under any of the ways in which money had and received to the use of a person can be recovered precedent to that effect, and he cannot say that there was an implied undertaking making it so. These costs are more than they are rent or interest of money. It is a desperate shift to get money, to which if the plaintiff had the right, he has left the time for enforcing it go by.

WILLIAMS and CROWDER, JJ., concurred.

*Judgment for*

## COURT OF QUEEN'S BENCH.

January 12, 1855.

REG. v. T. H. MARSHALL, ESQ.

*Criminal information—Applicant taking other means of redress.**Application for a criminal information against the judge of a county Court for misconduct in his office, it appeared that the party applying had previously memorialised the Lord Chancellor to remove the judge from his office on account of the same misconduct:**that although the Lord Chancellor had declined to interfere, the applicant had, according to the rule of this court, disqualified himself in applying for a criminal information.*

RULE had been obtained calling upon T. H. Marshall, Esq., the judge of the County Court held at Wakefield, to show why a criminal information should not be filed against him on account of certain misdemeanor and misconduct in his office. The affidavit disclosed the particulars of the alleged misconduct: but it is necessary to state more than this—that the judge having called a barrister of the name of Shaw, who practised in his court, to prove or deny the authorship of a certain report of a trial, which the judge considered libellous upon the court, and not having obtained an answer, refused to allow him to practice in that court. The affidavits in answer, in addition to other matter in vindication of Mr. Marshall's conduct, disclosed that Mr. Shaw had memorialised the Lord Chancellor to remove Mr. Marshall from his office on account of this misconduct; and that the Lord Chancellor had refused to interfere.

*Hill* (with him *Hardy*) now showed cause; and, after drawing attention to the circumstances stated in Mr. Marshall's vindication, objected that as Mr. Shaw had already sought other means of redress, he could not, according to the well-known practice of court, apply for a criminal information: (*R. v. Gwilt*, 11 & El. 587; *Ex parte* —, 4 Ad. & El. 576, a.)

*Atkinson*, contra.—This case does not fall within the rule as laid down by Lord Denman in *R. v. Gwilt*, because here the complainant has not “already adopted a regular course of what the court can consider legal proceedings.” The memorial to the Lord Chancellor is not in the nature of a legal proceeding; and is

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different altogether in purpose and effect from the application to this court.

LORD CAMPBELL, C. J.—I think this rule ought to be discharged. If Mr. Shaw had come here without first applying to another tribunal, there would have been strong grounds for an interference. There can be no doubt that a judge who acts maliciously in such manner as to prevent the due administration of justice, is guilty of a misdemeanor and liable to punishment; and it does appear upon the affidavits that Mr. Marshall acted unlawfully in addressing Mr. Shaw as he did, asking him whether he was the author of a libel, and upon not receiving a definite answer ordering him to be silent, and refusing to allow him to practise at that court. That was clearly illegal; and there appear strong grounds for saying that it was done maliciously. But, though one is shocked to find that such things occur in any of the regular tribunals of the country, we must dispose of the present application according to ordinary rules. Now, in this case the Lord Chancellor has been called upon to exercise the jurisdiction conferred upon him by the Legislature of inquiring into the alleged misconduct, and if he should think fit, of removing the judge. It is true that the Lord Chancellor has refused to interfere; and he has said that there may be an appeal to us from the Chancellor's decision; but I am clearly of opinion that to allow such an application would be quite contrary to our practice upon such applications, and very inexpedient. The application to the Lord Chancellor is to try and punish; and this is also an application to try, that is to put the accused upon his trial before a jury, and to punish if the accusation should be substantiated. Both proceedings, therefore, have the same object in view; and the first having been made and failed, we ought not to grant the second. This application is entirely to the discretion of the court. Although we may think that a misdemeanor has been committed, it is not obligatory upon us to grant leave to file a criminal information. By our law any person may put the criminal law in motion; and the ordinary courts of the country being still open to Mr. Shaw, we think that in the exercise of the discretion entrusted to this high tribunal, it would not be proper for us, after the application refused by the Lord Chancellor, to sanction the proceeding by criminal information; but under all the circumstances the rule will be discharged without costs.

COLERIDGE, J.—This is an application to the extraordinary jurisdiction of this court; and one of the well-established rules limiting the discretion of the court in granting such applications is this—that if the party who applies has adopted any other course to procure a remedy for the wrong of which he complains, he is bound to communicate what has occurred; and if it appears that he has pursued another remedy, his application will be refused. Now the memorial addressed to the Lord Chancellor by Mr. Shaw, after making grave charges of misconduct, prays for an inquiry into those charges, and also into Mr. Marshall's fitness from in-



temper for the office of a judge, and also into his reasons for removing Mr. Shaw from the County Court. The object of the application clearly was the removal of the judge, and that is a punishment of a very grave kind. This case therefore is in the general rule. Does it make any difference that the Lord Chancellor declined to interfere? Mr. Watson says that the answer of the Lord Chancellor is not before us, we do not know the grounds upon which he refused. That might be a good ground for impeaching the judgment of the Chancellor: but we are not here as a court of appeal from his decision; and I therefore think that this application ought to be refused. It is wrong, to express a positive opinion upon the facts; but, looking at the affidavits, I think we cannot avoid coming to a conclusion that there was misconduct on the part of the judge; and the rule should be discharged without costs.

MAN, J.—There was such a *prima facie* case of misbehavior as to induce the court to grant this rule; but if it had been informed of the previous application to the court, I doubt whether the rule would have been granted. The applications are clearly *in pœnam*, and the ground of both is the same. The case, therefore, is brought within the rule, and a person disqualifies himself from applying for the extra-judicial interference of the court when he has previously adopted another mode of proceeding.

TON, J., had left the court.

*Rule discharged, without costs.*

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v.  
MARSHALL.

1855.

Criminal  
information—  
Applicant  
taking  
other means of  
redress.

January 15, 1855.

ALCOCK v. DELANE.

*Application to strike out—Rule as to sending  
Non-compliance with the rules 162 and 163 of the C  
require an appellant to send two copies of the ca  
and one to the successful party, within three day  
signed, is no ground for striking out the appeal.*

HORN moved for a rule to show cause why th  
be struck out of the paper. It was an ap  
cision of a County Court; and the appellant had  
the rules 162 and 163 of the County Courts,  
party appealing to send two copies of the case  
and one to the successful party, within three d  
has been signed by the judge, and sealed with the  
In this case the copies have been sent, but not  
three days. [LORD CAMPBELL, C.J.—Is it m  
appealing, or is it only directory?] The rule pr  
not done, the successful party may proceed up  
[LORD CAMPBELL, C.J.—Then why have you  
applied; but the clerk of the court refused to al  
issue upon the judgment.

LORD CAMPBELL, C.J.—Then we must hear  
WIGHTMAN, J.—The provision is only direct

(a) By stat. 13 & 14 Vict. c. 16, s. 15, it is enacted that the ap  
case: and that "such case shall be transmitted by the appellant to t  
master's office of the court in which the appeal is to be broug  
providing that all cases are to be signed by the judge and sealed with  
is ordered that "when signed and sealed, one copy thereof shall be

## COURT OF EXCHEQUER.

*January 16 and 17, 1855.*

HILL v. SWIFT ET UX.

*jurisdiction of judge—Cause of action above 50*l.*—Authority to abandon excess at the trial—Costs.*

*plaintiff's claim was 96*l.*, reduced by a set-off as made by the defendant to 53*l.*; an objection being taken on the hearing to the jurisdiction of the County Court, the excess was then and there abandoned; the learned judge then heard the case and gave judgment for the plaintiff:*

*I, that a writ of prohibition must issue; and, per Alderson, B., that defendant should be entitled to his costs up to the hearing, when the excess is then abandoned.*

LISS, Q.C. (*Kemplay* with him), showed cause against a rule obtained in this case for a writ of prohibition to issue to Mr. Hall, the judge of the County Court of Yorkshire, holden at Leeds, for the purpose of staying all further proceedings upon the action; the plaintiff's demand sought to be recovered was 96*l.*, but the defendant supplied a set-off reduced it thereby to 53*l.*; the defendant objected to the jurisdiction of the County Court, and urged that the learned judge had no authority to determine the question, the amount sought to be recovered exceeding 50*l.* There were some conflicting affidavits as to what then took place; but it seemed the plaintiff's attorney then waived the excess, the defendant's attorney protesting against his right then to do so, or that the judge should then adjudicate upon it; but the learned judge proceeded on the case, and gave judgment for the plaintiff, notwithstanding the case of *Awards v. Rhodes*, 8 Ex. 312, was expressly brought before him—a decision of this court, showing that under the circumstances he had no jurisdiction—he said he would not countenance such technical objections, but would help the plaintiff all he could; and thereupon ordered the plaintiff's particulars of demand to be amended under his own dictation, so as to reduce the demand to 50*l.*, the plaintiff being therein made to profess to abandon the excess, although it did not appear that she did so consent, and although such a course was objected to by defendant's counsel. The affidavits then went on to state that, the defendant having left the court, the judge ordered the amended particulars to be served on his attorney, and then took the case as an undiminished action for 50*l.*, after which he gave a verdict for 50*l.*

the payment of 74l. 10s. 7½d. by Megsen in account of the plaintiff leaving a balance of 53 account was appended this notice, "And I see the extent of the jurisdiction of this court." when amended, did not give any credit for the sum by Megsen, and they were preceded by the "This action is brought to recover the sum of of the sum of 96l. 16s. 8d., the amount due to account, and I abandon the excess."

*Kemplay* referred to *The Lenden Union v. S* 316, Ex. [PARKE, B.—I wish you would judge had power to amend in this way.] There was there, and the court will presume that the the client as it became necessary. [POLLOCK not appear upon the affidavits; it is not quite that the attorney would have any power to amend and abandon a part without consent. In such a case as this, we presume nothing; presumption would rather be the other way.] *The Rhodes*, relied so much upon by the other side prohibition; it was an appeal, and wholly different to the present; he also cited *Isaac v. J* 1 Cox & Macrae, 550.

*Edwin James*, Q.C., and *Prentice*, in support not called upon.

POLLOCK, C.B.—It is quite clear the rule is prohibition.

PARKE, B.—I think so, certainly.

ALDERSON, B.—The defendant may have the very ground that the judge had no jurisdiction had not jurisdiction; that being so, the defer

## COURT OF QUEEN'S BENCH.

*January 26, 1855.*

GRAHAM v. BURGESS.

*Appeal—When it lies—Amount of claim and amount recoverable.**Right to appeal against the decision of a County Court judge, under 13 & 14 Vict. c. 61, s. 14, does not depend upon the amount claimed in the plaint, but upon the amount legally recoverable.**Here, therefore, in an action against the bailiff for neglecting to levy, and for a false return, the plaintiff claimed 20l. 1s., but the amount of debt and costs which the bailiff ought to have levied was only 12l. :**that, as the plaintiff would not be entitled to recover damages in excess of the amount of debt and costs in the former action, he was not entitled to appeal.*

THIS was an appeal from a decision of the judge of the County Court of Cheshire, holden at Congleton. The plaintiff claimed a sum of 20l. 1s., and was brought against the high bailiff of the county for not levying under process issued in a former suit, and for a false return. The amount of debt and costs which the bailiff was required to levy in the previous suit was only 12l. 17s. 8d.

MR. INTYRE, for the respondent, took a preliminary objection, that the appeal lay in this case, because the amount recoverable was not more than 20l. The plaintiff could not legally recover more than the amount of debt and costs in the former action; and he could not avail himself to appeal by merely claiming in his plaint a larger amount. He referred to *Arden v. Goodacre*, 11 C. B. 367; and *Wells v. Hood*, 2 Lord Raym. 1411.

MR. LLOYD, *contra*.—The amount ultimately recoverable is not material. To hold the appeal dependent upon the amount recovered, would very much limit the operation of this beneficial statute; and when the statute provides that there shall be a right of appeal in every case over which jurisdiction is given by that act, it refers to the claim made in the plaint; because the judge is to look to the amount there stated to see whether he has jurisdiction. In this case he would not have had jurisdiction to enter this plaint before the passing of 13 & 14 Vict. c. 61. [COLERIDGE J.—Do you admit that the damages are limited by the debt

County Court Act; and the jurisdiction was stat. 13 & 14 Vict. c. 61. But it is only in the extended jurisdiction applies that there is a sect. 14. This was not such a case, and the appeal.

COLERIDGE, WIGHTMAN, and CROMPTON, :

## COURT OF QUEEN'S BENCH.

*January 30, 1855.*

CARTER v. SMITH.

*New trial—Dispensation with notice of motion.*

*Judge of a County Court has power to grant leave to move for a new trial, although seven days' written notice of motion has not been given pursuant to rule 141 of the County Court rules, and the time for giving such notice has elapsed; it being a matter for his discretion whether the case is such that leave ought to be granted.*

RULE nisi was obtained on a former day for a prohibition to the judge of the County Court of Oxford. The plaintiff in an action to recover the price of various articles of jewellery, and for 10*l.* money lent, supplied to the defendant during his minority, obtained a verdict. Whereupon the defendant intimated that he should apply at the next court for a new trial; but his attorney being unacquainted with the practice, gave only seven days' notice only in writing of his intention to apply to the court. At the day of hearing the plaintiff objected to the insufficiency of the notice, and the judge ruling in his favour, the defendant's counsel applied to the judge for leave to move at a future day for a new trial, undertaking to give seven days' written notice of the application in the meantime. The other side then argued that the judge had no power to grant such leave; but the judge ruled that he had, and accordingly granted leave to defendant to move for a new trial at a future day. Whereupon the plaintiff applied and obtained this rule nisi for a prohibition.

*J. O. Griffiths* showed cause.—The judge of the County Court having thought that this was a fit case in which he in the exercise of his discretion ought to grant leave to the defendant to move for a new trial, although he had not given the seven days' written notice required by rule 141, had power to do so. By the 9 & 10 Vict. c. 95, s. 89, it is enacted "that the judge shall have power to nonsuit the plaintiff in every case in which satisfactory proof shall not be given to him entitling either the plaintiff or defendant to the judgment of the court; and shall also in every case



any more than would be made in common  
said courts. Then the County Court rule 141,  
application for a new trial, or to set aside pr  
made and determined on the day of hearing, i  
present, or may be made at the first court he  
expiration of twelve clear days from such day of  
party intending to make such application shall  
before the holding of such court, deliver a notice  
by himself, his attorney, or his agent, stating t  
intended application, and also the court at whic  
is proposed to be made, to the clerk at his c  
similar notice to the opposite party by serving tl  
on such party, or by leaving the same at his  
business, and such notice shall not operate as a s  
unless the judge shall otherwise order: and if r  
court under any execution or order in the su  
retain the same and abide the event of the ap  
and if no such application be made, the money  
be paid over to the party in whose favour the  
unless the judge shall otherwise order; and if s  
not made at the court mentioned in the noti  
application for a new trial or to set aside pr  
made, unless by leave of the judge, and on suc  
think fit." And rule 86 provides, that "when  
by the practice of the court to be done by eith  
during the hearing has not been done, the judg  
cretion, and on such terms as he shall think fit, a  
to enable the party to comply with the practi  
regulate the practice, and do not limit the juria  
cases to grant new trials under sect. 89. I  
enables the judge to adjourn the hearing to c  
comply with the practice. Therefore the judg



as to moving for new trials within four days. We may with that rule.] The rule 141 requires something to be a condition precedent to moving for a new trial, which has been done. [LORD CAMPBELL, C.J.—Has not the judge granting leave to move for a new trial if the party has been prevented by *vis major* from giving the seven days' notice?] Also in the rule, which declares the exception to the rule, is a case where a good seven days' notice has been given for a particular court day, and the application is not then made, and the application to such a case as the present.

CAMPBELL, C. J.—There is no ground for a prohibition *se.* It is said that the judges of the County Court are vested with the discretion that has here been exercised. Section 89 gives them an express power in every case whatever to grant a new trial on such terms as they may think fit. Then the County Court rules lay down a very useful rule, that seven days' notice of moving for a new trial shall be given, and sufficient ground be laid before the judge to show why that rule has not been observed, and in that case he will do well to grant a rule for a new trial. If the proper notice for moving for a new trial, from some inevitable accident or other lawful excuse, has not been given, it is monstrous to say that the County Court judges have no power to grant a new trial. The rule in question is analogous to the rule in the Superior Courts, and we must acquiesce with compliance with that rule in certain cases. It seems to me that this rule is a matter of practice, and that the County Court judge had jurisdiction in this case, and was not wrong in granting a motion for a new trial, notwithstanding the non-compliance with the rule.

JUDGE, J.—The argument for this prohibition is founded on an inconveniently strict construction of the 141st rule. It goes into a great number of minute particulars, and the rule applies with the same force to noncompliance in any one of them. Suppose that the proper notice had not been given in any of the circumstances of inevitable necessity, or owing to the neglect of the opposite party, it is said that the judge is tied to this rule, and cannot take such matters into consideration. I think that is not so, and that he is at liberty to comply with it, and grant a new trial.

MAN, J.—Under sect. 89 the County Court judges have power to order a new trial, and stay the proceedings in every case. The general power is given without limitation as to notice of motion, or any condition precedent. The 12 & 13 Vict. c. 101, authorizes rules to be made for the practice and proceedings in County Courts; and, to a certain extent, the rules that have been made are to be considered as incorporated into the act. There are no words in rule 141 making it a condition precedent that seven clear days' notice of motion for a new trial shall be given. The rule is, in its terms, directory. The judge of the County Court may refuse to grant a motion for a new trial on the

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*New trial—  
Dispensation  
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motion.*

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COURT OF EXCHEQUE

January 26, 1855.

MORETON v. HOLT.

*Judgment.*

*A County Court judgment cannot be removed into Courts at Westminster for the purpose of issuing under the 17 Geo. 3, c. 70, s. 4 ; or 1 & 2 Vict. c. acts do not apply to the County Courts as at present.*

THE plaintiff in this case had recovered a County Court at Windsor, against the defendant, a sum of money above 20*l*. A new trial was applied for and refused. Afterwards, an *ex parte* application was made to the chambers, to remove the judgment into the superior court for the purpose of issuing execution thereon, under the 17 Geo. 3, c. 70, s. 4 ; and 1 & 2 Vict. c. 110, s. 22 ; this the learned judge refused. An application was afterwards made to Mr. Justice

referred the matter to the court. A rule *nisi* was accordingly made, and

*Griffiths* showed cause.—The judgment in the County Court is properly removed under the powers given by the 19 Geo. 3, 70, s. 4, or the 1 & 2 Vict. c. 110, s. 22. The former says, "as farasmuch as persons served with process issuing out of inferior courts where the debt is under 10*l.*, may, in order to avoid execution, remove their persons or effects beyond the limits of the jurisdiction of such court, it then enacts, that in all cases where a final judgment shall be obtained in any action or suit in any inferior court of record, it shall be lawful for any of His Majesty's Justices of Record at Westminster, upon affidavit made and filed in support of such judgment being obtained, and of diligent search and inquiry having been made after the person of the defendant, his, her, or their effects, and of execution having issued against the person or persons or effects, as the case may be, of the defendant or defendants, and that the person or persons or effects of the defendant are not to be found within the jurisdiction of such inferior court, and such superior court to cause the record of

said judgment to be removed into such superior court, to issue writs of execution thereupon, against the person or effects of the defendant in the same manner as upon judgments obtained in the said courts at Westminster, &c. [PARKE, B.—But there is no power to arrest a party under the new County Courts Acts; a person may be taken into custody and imprisoned for a number of days as for a contempt; not in execution, or as a discharge of the debt. The act cited, therefore, does not apply; it is not the kind of judgment that can be removed. This County Court is not such a court of record as was contemplated.] The 1 & 2 Vict. c. 110, s. 22, enacts "that in all cases where final judgment shall be obtained in any action or suit in any inferior court of record in which, at the time of passing of this act, a barrister of not less than seven years' standing shall act as judge, &c. . . . It shall be lawful for the judges of any of Her Majesty's Superior Courts of Record at Westminster, &c., or for any judge of any of the said courts at chambers, either in term or vacation, upon the application of any person who, at the time of the commencement of this act, shall have recovered, or shall at any time thereafter recover such judgment, &c., upon the production of the record of the judgment, such record, &c., being under the seal of the inferior court, and signature of the proper officer thereof, to order that the judgment be removed into the said superior court, &c.; and immediately thereupon such judgment shall be of the same force as a judgment recovered in such superior court, &c. All the requisites have been complied with by affidavits.

ANDERSON, B.—You ought to show that the judge was a barrister of at least seven years' standing; but I know that by the Act of Parliament establishing these County Courts, an attorney may be appointed. In the case referred to, of *Copeman v. Madden*, no one appeared to show cause against the rule, and

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1855.

County Court  
judgment—  
Not removable  
into the  
Superior Courts.

apply to these new County Courts.

*Lush*, contra, not called upon.

*Per curiam*.

*Rule absolute, with costs; the defendant to be  
custody; no action to be brought.*

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## COURT OF COMMON PLE

*January 22, 1855.*

BORTHWICK AND OTHERS, Apprs. v. WALTON  
Resps.

*Appeal—9 & 10 Vict. c. 95, s. 60—Meaning of ‘  
The defendants, carrying on business at Oxford, gave  
the plaintiffs at Oxford for goods to be sent from  
the plaintiffs carried on business) in the usual way  
and North Western Railway. The goods were sent  
accordingly, from a station within the jurisdiction  
of Lancashire, at Manchester. A summons was given  
of that court against the defendants for the value of  
Held, that the order at Oxford was part of the cause  
it being necessary, under sect. 60, that the writ  
should have arisen in Manchester, the judge of the*

bert Brant, Esq., the judge of the said County Court at, &c., the 15th November, 1854; and upon such trial the plaintiffs appeared by their attorney, and the defendant Elliott by his counsel: the defendant Borthwick did not appear. The plaintiffs have a long time carried on the business of general Manchester rehousemen, and have no other place of business than at Manchester. The defendants have both resided at Oxford, carrying business there. It was proved at the trial that in March last J. Walton, one of the plaintiffs, was at Oxford on his usual rounds soliciting orders, and then and there a verbal order for goods, the price and value of which the action was brought to recover, was given by the defendant Borthwick to and received by said J. Walton for the plaintiffs, with a direction that the goods should be sent in the usual way, which had always been by London and North Western Railway; and that, in pursuance of such order, which was communicated by the said J. Walton to the plaintiffs' firm at Manchester, the goods so ordered were sent to the plaintiffs by railway from Manchester, from a station within the jurisdiction of the said court, to Oxford, within the jurisdiction of the County Court of Oxford, holden at Oxford, addressed to Borthwick and Co.; and it was contended on behalf of the defendant Elliott, that as the order for the goods in question was given and received by the plaintiffs at Oxford, within the jurisdiction of the County Court of Oxford, and not at any place within the jurisdiction of the said County Court in which the said plaintiff was brought and trial had, and it was in consequence of such order, that the goods in question were sent by the plaintiffs, the whole cause of action did not arise within the jurisdiction of the last-mentioned court; and it was objected that the whole cause of action should have arisen within the jurisdiction of the said last-mentioned court, to give the said last-mentioned court jurisdiction either to give leave for the issuing of the said summons proceedings in the said cause; and on the part of the plaintiffs, it was in answer contended, that the said order for the said goods being a verbal order, did not form the said cause of action, but as the said goods were delivered in pursuance of the said order, from the plaintiffs' warehouse to the railway company within the jurisdiction of the said court of Lancashire, the cause of action arose within the district of the said last-mentioned court; and the learned judge held, in point of law, that the delivery of the goods in question to the railway company, addressed as aforesaid, was a delivery to the defendants, and that as the said delivery took place within the district of the said court of Lancashire, he had full jurisdiction to hear the said cause and determine notwithstanding the said order was given to and received by the plaintiffs, within the jurisdiction of the said County Court of Oxford, holden at Oxford; and he accordingly proceeded to determine the said cause, and gave judgment for the plaintiffs for the full amount claimed, and costs; and an order was thereupon made accordingly.

The question for the court was, whether, under the circum-

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9 & 10 Vict.  
c. 95—  
*Meaning of*  
*"cause of*  
*action" in*  
*sect. 60.*

JUL. 300, 1 COX & MACHAC, 200; *THUR V. LONG*, 1 *Re Walsh*, 1 El. & Black. 383.) The order of Oxford would have been a binding contract, b of Frauds; it is that which made the contract, is the foundation of the cause of action: (*Barn L. J.* 388, Q. B.; *Re Fuller*, 2 El. & Black. 5 case it was held under this section, that the tal of administration was part of the cause of action sued the administrator: (*Smith v. Rolt*, 9 C. & is an express order for the delivery of goods, thi [MAULE, J.—If the order had not been given, been no cause of action, and therefore it must cause of action.] The 128th section shows thi to give jurisdiction only where the whole caus within the district: (*Ghislin v. Dean*, 12 Jur. 82; 195.)

*Aspland* for the respondents.—It has been h action may arise in the place from which goods *land v. Lewis*, 2 Stark. 33; *Huxham v. Smi Harwood v. Lester*, 3 B. & P. 617; *Emery v. Raym.* 1555.) [MAULE, J.—Suppose the pl everything but the order, could he have succe that proof of the delivery to some one in Man fendant would do. That might have been goo order. [MAULE, J.—What took place in Man livery of the goods to the carrier—if that is not of action, no part occurred in Manchester. If i it was not the whole cause of action.] The 60t be made to harmonize with the 128th section.

JERVIS, C. J.—It having been decided that ' in the 60th section means whole cause of action

## COURT OF EXCHEQUER.

*January 27, 1855.*

HERNAMAN v. SMITH.

*County Court jurisdiction—Cause of action where arising—Apprehension  
—Conviction.*

*Offered a reward for the apprehension of any person stealing sheep. Apprehended a sheep-stealer in the district of the County Court of Newnham, but he was convicted at the Hereford assizes. B. then commenced a plaint against B. for the amount of the reward in the County Court of Newnham :*

*on an application to rescind an order for a prohibition, that the cause of action did not wholly arise within the jurisdiction of the County Court of Newnham, under the 60th section of 9 & 10 Vict. c. 95.*

*In this case an action had been brought in the County Court of Gloucestershire, holden at Newnham, to recover the sum of the amount of reward offered for the apprehension of sheep-stealers by a bill in the following terms;—*

*Such Marcle Association for the Prosecution of Felons:—whose names are hereunto subscribed, having entered into association for the detection, apprehension and prosecution of, hereby offer the following rewards (over and above what is provided by Act of Parliament) for the apprehension of any person or persons who shall commit any or either of the undermentioned offences on any or either of our respective persons or properties.” Then followed a list of offences and rewards, and amongst them, for stealing a sheep a reward of 20*l*.*

*The above rewards will be paid on conviction of the offenders, applying to Mr. Burgum, the treasurer.”*

*This paper had the name of the defendant, amongst others, added to it. The summons was issued out of the County Court at Newnham by leave of the judge, on the ground that the cause of action arose within the district of the said County Court; and the hearing thereof the plaintiff John Hernaman appeared by counsel, and the defendant Thomas Smith appeared by counsel pleaded to the said action, “not indebted.”*

*The plaintiff’s attorney then proceeded to call evidence in support of the said claim, and put in evidence the handbill, and showed that the defendant Thomas Smith was a member of the association therein mentioned, and the then treasurer thereof, in*

adjourned by the judge of the said County C  
following court day.

The cause came on again for trial at Newnha  
the 27th day of November last, and on that occa  
attorney again appeared for him, and the defend  
also appeared by his counsel, when the plaintiff  
evidence a certificate under the hand of the dep  
of the Oxford circuit, in accordance with the A  
of the conviction of the said Samuel Rock at  
proof of such certificate it was objected on the  
dant that the judge of the County Court at  
jurisdiction, inasmuch as the conviction had take  
jurisdiction of the said County Court; to which  
on the part of the plaintiff, that the cause of t  
apprehension of the offender, and that as the  
been proved to have taken place within the  
Newnham County Court, the judge had jurisdic  
the judge, after hearing the argument on both  
follows: "I am of opinion that the apprehensio  
action, and that the mention of the conviction  
regulates only the time and mode of payment of  
the apprehension being in this district, I think th  
diction." Whereupon plaintiff's attorney procees  
and at the close of the said plaintiff's case, th  
defendant went into evidence, with a view to pr  
John Hernaman did not apprehend the said S  
that he was in fact apprehended in Newnham  
party; but failed in support of such defence,  
ultimately found a verdict for the plaintiff for 1  
cost of action.

A summons was subsequently taken out on th



and costs, and was in due course levied. Subsequently the defendant obtained an order before Platt, B., for a prohibition. A rule was shown cause why such order of Platt, B., should not be rescinded having been obtained;

*Honyman* now showed cause.—The question is, whether the cause of action in this case arose within the jurisdiction of the County Court. Here the apprehension took place at Newnham; at the conviction, which was necessary to complete the cause of action, was at Hereford; and, to bring the case within this statute, the whole cause of action must arise within the jurisdiction:

& 10 Vict. c. 95, s. 60.) It is not only the promise which is the cause of action; it is the promise *plus* the breach. [PARKE, B. Everything is done by the plaintiff to entitle him to the reward; the reward is payable upon a contingency, and that contingency takes place out of the jurisdiction; does that oust the County Court of its jurisdiction? That is the question. Everything is done within the jurisdiction that the plaintiff is bound to do.] The cause of action arises on the conviction; and there is a complete cause of action till then. It was the intention of the legislature either that you should serve the defendant where he was arrested, or where the contract was made, and where therefore, presumably, the witnesses resided. The Statute of Limitations would commence to run until the conviction, which shows that until then there was no complete cause of action. A case of appeal, *Northwick and others v. Walton and others*, was heard in the Court of Common Pleas on the 22nd instant, that was an appeal from the County Court of Lancashire, held at Manchester. The plaintiffs resided at Manchester, and the defendants at Oxford. Maule, J., said, "Everything that is requisite to show a ground of action is part of the cause of action." Suppose this was an action

on a life policy, or on a *post obit* bond, would not the death be a part of the cause of action? He cited *Harrington v. Ramsay*, L. J. 326, Ex.; *Buckley v. Hann*, 5 Exch. Rep. 43; 1 Co. Ct. 269; *Reg. v. Birch*, 1 Bail. C. C. 56; *Re Fuller*, 2 E. & B. 25; *Murray v. East India Company*, 5 B. & Ald. 204; Com. Dig. B. Comit. p. 9; *Peacock v. Bell*, 1 Wms. Saund. 74 n.; *Ireland v. Ackwood*, 1 Roll. Abr. 546.

*Macnamara* in support.—The cause of action within the meaning of the section arose within the jurisdiction of the Newnham County Court, although that cause of action could not be enforced until the conviction. The contract was made, and all the requisite conditions to be performed by the plaintiff were complied with within the district of that court; it was only in that in which the plaintiff had no voice that was done out of the district. The cause of action differs materially from the right of suing. The foundation or gist of the action under this section has reference to the locality, and not to the time of suing. It is the substance that must be regarded, and not all that must be alleged in a declaration, or all that must be proved: (*Williams v. Land*, 4 Taunt. 729; *Mutton v. Clark*, 6 Taunt. 29.) [ALDERSON, B.—I must say, if

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9 & 10 Vict.  
c. 95—  
meaning of the  
word, "cause  
of action."

the Statute of Limitations began to run from the date of the letters of administration, and not from the time when the cause of action accrued, there being no cause of action until there was a bill of exchange, the indorsement of which was made in the city of London, but the delivery was not made within the county of Middlesex, and it was held that the cause of action did not arise within the city; because there was no cause of action until delivery: (*Marston v. Allen*, 8 M. & W. 736; *Buller v. Fox*, 18 L. J. 304, C. B.). He also referred to Com. Dig. Tit. Action, n. 1. *Wer's case*, 7 Co. 2 a. 1 Wms. on Ex. 701, 1; *Marshall*, 21 L. J. 388, Q. B.; *Reg. v. Birch*, 21 L. J. 260, Q. B.; *Wild v. Sheridan*, 21 L. J. 260, Q. B.; *Ma* M. & W. 736; *Buller v. Fox*, 18 L. J. 304, C. B.).

POLLOCK, C. B.—We are all of opinion that the bill should be discharged; it is unnecessary to discuss the course of the argument on both sides. I found this, that it appears to me clear that in this case the bill was part of the cause of action; without it the cause of action would not exist. That being so, the Court of Common Pleas has jurisdiction of the bill, and the County Court district. I think we are bound to discharge the bill, and for myself do not feel disposed to depart from the opinion of the majority.

PARKE, B.—I am of the same opinion. I think there might be some distinction between what was the cause of action and collateral matters; but in the cases cited, I am satisfied there is no such distinction. The cause of action is *all* that there is in the bill, and that it be by the plaintiff or by a third person. I am of opinion that this rule ought to be discharged.

ALDERSON, B.—I am of the same opinion.

## COURT OF COMMON PLEAS.

*April 16 and 17, 1855.*

SWANN v. DAKINS.

*imprisonment under 9 & 10 Vict. c. 95, s. 99—Queen's servant—  
Privilege—Habeas corpus.*

*commitment under the 9 & 10 Vict. c. 95, s. 99, is not a commitment  
or contempt or by way of punishment, but is a limited execution.  
privilege of the Queen's servants extends to protect them from such  
commitment.*

*refores, where one of the priests in ordinary had neglected to attend  
a judgment-summons under sect. 98, and a habeas corpus had been  
granted by a judge at chambers, the court upon the return of the writ  
ordered him to be discharged.*

THE defendant in this case had been committed by the judge  
of a County Court under stat. 9 & 10 Vict. c. 95, s. 99, for  
attending in obedience to a summons obtained after judgment  
against him under sect. 98 of the same act, requiring him to  
appear. A writ of *habeas corpus* having been issued by a judge at  
chambers;

James, Serjt. now applied to the court to discharge him out of  
custody, as privileged, upon affidavit showing him to be a priest in  
the service of the Chapel Royal at St. James's, and in the receipt of  
a salary. The 99th sect. enacts, "that if the party so summoned  
does not attend as required by such summons, and shall not allege  
a sufficient excuse for not attending, or shall, if attending, refuse  
to swear or to disclose any of the things aforesaid, or if he  
does not make answer touching the same to the satisfaction of such  
judge, either by the examination of the party, or by any other  
means, that such party, if a defendant, in incurring the debt or  
liability which is the subject of the action in which judgment has  
been obtained, has obtained credit from the plaintiff under false  
pretences, or by means of fraud or breach of trust, or has wilfully  
contracted such debt or liability without having had at the same  
time a reasonable expectation of being able to pay or discharge the

it shall be lawful for such judge, if he shall thin any such party may be committed to the common correction of the county, district or place in summoned is resident, or to any prison which is the prison of the court, for any period not exceeding [JERVIS, C.J.—If the not obeying the summons you must go to the County Court.] The writ for a contempt, it is a limited execution. (*W. 7 T. R.* 117; and *Sir E. Knatchbull*, 7 T. R. even if it is a contempt, it is made so for the purpose of payment. [JERVIS, C.J.—The regular course is by writ of privilege. You had better take till into that.]

*April 17.*—*Byles*, Serjt. resumed his argument on the question whether the proceedings for relief of a writ be by *habeas corpus* or by writ of privilege; till the case of *Re Thompson*, 2 M. & W. 645, in which a writ was sued out in the Exchequer. [JERVIS, C.J. notice how the writ is there tested; it issued on the side of the Exchequer. It is a privilege which can be sued in his own court. If you sue a writ against the Queen's Bench, he can remove the case to the Queen's Bench of right to the Exchequer.] This is not a writ of privilege, but one for *habeas corpus*: (*Vit. Privilege, B.*) [JERVIS, C.J.—Why can't it apply to the inferior court which imprisoned him? It is a common right of every man in custody of court or judge for his writ of *habeas corpus* to be brought up for his discharge if wrongfully detained. *habeas corpus* does not depend upon the

goes to the inferior court, and the judge says, "I discharge you," what is he to do? he must return here; therefore, this court give him relief at once? Surely the he Superior Court are the parties to determine whether lings in the court below are or are not good in law. It ed that this writ should be granted *ex debito justitiæ*. The Court Act says in effect that the defendant shall custody until he has paid the debt, or is released by the CRESSWELL, J.—The act takes away privilege.] The ict. c. 101, s. 18, taken with 9 & 10 Vict. c. 95, s. 67, question of privilege clear.

, contra, referred to Bacon's Abridgment, tit. Privilege, uestion as to the right of the Superior Court to interfere acts of an inferior court was discussed and the law n *Carus Wilson's* case, 7 Q. B. 1008; Comyn. Dig. tit. A. 3; *Polkidday v. Colonel Pitt*, 2 Strange, 988. The which process issues has undoubtedly power to deal n acts: (*Chester v. Hopsdale*, 1 Wils. 278; 12 & 13 9, s. 10; *Luntley v. Patten*, 2 B. & Al. 237; *Kinning's* B. 739; *Ex parte Kinning*, 4 C. B. 521.) To show that s is for a matter in the nature of a contempt there is y's case, 2 Russ. & M. 667. The impression of the ll cases which have come before them under this power ment given by the County Courts Acts, has been that ce to the order of the court is a matter of contempt: *Fletcher*, 2 Ell. & Bl. 271; *Abley v. Dale*, 11 C. B. 378.) erjt. in reply.—As to the point about the affidavits, e used to explain a return: (*Ex parte Eggington*, 23 ; Cas. 41.) There Lord Campbell said: "Although is good on its face, it is competent to show by affidavit rest took place on a Sunday. If such a course were d, that or any other privilege from arrest would be availing, as the fact upon which it rests would not n the return." The object of the proceedings men- he two sections is to obtain the money by restraint of precisely as in the case of an attachment. [CRESSWELL, se the man were imprisoned for forty days, and the e then paid, but the judge would not let him out, what he course then?] A *mandamus* to the judge to compel e leave; the act of the judge is ministerial, and the is entitled to have that leave upon payment of debt and CRESSWELL, J.—Perhaps the clause is only to prevent from letting him out without the leave of the judge.] *te Eggington* the court held that the summary remedy ing to gaol town-clerks who wilfully refuse to deliver &c. to the council is in the nature of civil process.

C. J.—Though I have had some doubts during this yet on the whole I think that this applicant is entitled arge. There is no question that if this were an appli- a court out of which a writ of *ca. sa.* had issued, he

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*under sect. 99—*  
*Privilege—*  
*Habeas corpus.*

for contempt. It is said again, that the commitment are not a satisfaction of the debt, and that he is not entitled by payment to his discharge; leave of the judge. The fairer meaning of that is that when the money is paid the judge becomes an officer, who is to authorise his discharge; and the act to be done like the signing the certificate enable the officer to discharge the man, and he does so as a matter of course. I think, therefore, that the writ is not taken away. But it is further said, that yet the party has mistaken his remedy, and that he should apply to the court out of which the writ issued, and that the matter cannot be disposed of by affidavit return, but that, if the matter be clear, the Court should discharge him, and if not, that he should sue for a writ of habeas corpus, and have the matter solemnly argued. I think that there is a difficulty attending the case, but that the old practice, it was not usual to discharge a man by affidavit, but to issue a writ. Mr. Milward has said that a writ could be issued and tried in the way that there can be no summary application to the Court if the party is illegally convicted; how is he to be delivered out of the case of a servant of the Queen being discharged of a proceeding; and I think that the application should be for a writ of habeas corpus.

CRESSWELL, J.—I am of the same opinion that by reason of his office, Mr. Dakins is privileged from execution of debt, and the only point is, how the debt is to be enforced. The debt is not satisfied by payment, and yet it is an execution; the rules which apply to a discharge of the debt are not applicable.

ner. The certificate must be given, and the leave of discharge must be given. Then the character of the imprisonment is clear, and we cannot leave the application to be made in the inferior court, for the judge of the inferior court might refuse to allow the privilege, and the punishment might be suffered before we could interfere. On the other point I am content to abide by the decision of my brother Patteson.

WILLIAMS and CROWDER, JJ., concurred.

SWANN

v.

DAKINS.

1855.

*Imprisonment  
under sect. 99—  
Privilege—  
Habeas corpus.*

*Rule absolute.*

## COURT OF EXCHEQUER.

*April 17, 1855.*

TAYLOR v. THE CROWLAND GAS AND COKE COMPANY.

### *Corporation.*

*Corporation is liable to be sued in the County Court; where therefore a corporation is sued in the Superior Court, and a sum under 20l. is recovered, which action may have been brought in the County Court, the plaintiff will get no costs.*

**THIS** was an action brought against the defendants, a joint-stock company and *quasi* corporation, in which the plaintiff recovered 7l. only, and a rule having been obtained by him to show why the master should not be at liberty to tax the plaintiff costs of the action and this application, and why the plaintiff should not recover the same notwithstanding the sum recovered under 20l., pursuant to the 15 & 16 Vict. c. 54;

Patteson, Q. C. and Seymour showed cause, and contended that, by the 9 & 10 Vict. c. 95 (the County Court Act), a corporation might be sued in the County Courts; in the 142nd section of that Act (the interpretation clause) it is expressly enacted that the word "person" shall be understood to mean a body politic, corporate or collegiate, as well as an individual. The case is therefore within the 129th section and out of the 128th, by which the County Court jurisdiction is given, as the plaintiff did not reside more

County Court, where, as here, the interest is in the most distant parts of the country, and another. The only question now is, whether there is concurrent jurisdiction; if it had, then it is by 15 & 16 Vict. c. 54, s. 4, which gives the County Court chambers powers to make an order entitling the plaintiff to his costs if the plaintiff shall make it appear that he has brought for a cause in which concurrent jurisdiction exists in the superior courts by the 9 & 10 Vict. c. 95, *Lawrence and others*, 2 L. M. & P. 363; and 1 L. M. & P. 379, were cited.

#### JUDGMENT.

POLLOCK, C.B.—I am of opinion, and I am the opinion of the whole court when I say we are of opinion that the rule in this case ought to be discharged. A company constituted under the Joint-Stock Companies Act, and for certain purposes are a corporation, and the jurisdiction of the County Courts extends to actions against such a company; it is clear by the interpretation clause; yet it is not necessary to resort to that, as an action may well be brought against a corporation as against an individual. The action in this case has been brought in the County Court and a sum of 7*l.* only recovered. The question is, whether the 128th and 129th sections of the 9 & 10 Vict. c. 95, which the judge read those sections.] Is this a plaintiff for an action than those hereinbefore mentioned? The answer is, he has a right to bring an action in the County Court because he lives more than twenty miles from the County Court; that be not the ground I know of no other.



it is now unnecessary to decide that. This action might have been brought in the County Court, as the sum recovered is under 20*l.*, and the parties do not dwell more than twenty miles apart.

PARKER, B.—I am of the same opinion. I think an action may have been brought in the County Court. At common law it is so down in Com. Dig. where the parties lived within the county; there is no doubt that, under the County Court Act, a corporation may be sued there, and it is perfectly clear the County Court has jurisdiction over this corporation. [The learned baron at the 128th and 129th sections, 9 & 10 Vict. c. 95.] The defendants must be considered as living and carrying on their business within twenty miles of the plaintiff.

LATT and MARTIN, BB., gave similar judgments.

*Rule discharged with costs.*

TAYLOR  
v.  
CROWLAND  
GAS AND COKE  
COMPANY.

1855.

Corporation  
may be sued in  
the County  
Court.

## BAIL COURT.

May 2, 1854.

CHAMBERS v. WILLES.

(Before Mr. JUSTICE COLERIDGE.)

*Payment into court of a sum less than 20*l.*—Taking same out in full satisfaction—Costs.*

*When an action is brought in one of the Superior Courts for a sum over 20*l.*, and the defendant pays into court a sum under 20*l.* which the plaintiff takes out in full satisfaction, he, the plaintiff, is entitled to his costs of the action.*

RENTICE on a former day moved on behalf of the defendant for a rule calling on the plaintiff to show cause why the plaintiff should not be deprived of his costs in this action, and why the master's *allocatur* of 8th last March should not be set aside, why the sum of 3*l.* 2*s.* 6*d.* paid by the defendant to the plaintiff, under protest, for his costs should not be paid back. It was an action brought to recover a sum of money over 20*l.* for goods sold and delivered. To this the defendant pleaded a defence as to part, and paid 7*l.* 1*s.* into court as to the residue. The

His LORDSHIP to-day gave the following

JUDGMENT.

This case stood over from an intimation that it come before some of the other judges and been made inquiries on the point, and I find it has been made at chambers. There was concurrent judgment that the plaintiff claimed to recover 35*l*. odd. The defendant asked for a sum under 20*l*., about 8*l*. The plaintiff asked for full satisfaction. No order was made by any of the judges as to the plaintiff his costs, and without that order the plaintiff was to pay the costs, and it was contended that the master should do so. I find on inquiry that as many as considered the point, and thought the taxation of costs was right, and they have done that upon the 11th section of the 13 & 14 Vict. c. 61, and to the force of the 73rd section of the 15 & 16 Vict. c. 11th section of the act I have first mentioned say that in any action commenced after the passing of this act in any of Majesty's superior courts of record, in covenant, assumpsit, &c., the plaintiff shall recover a sum not exceeding twenty pounds . . . the plaintiff shall have judgment for such sum only and no costs." And if they had been in such a case within the meaning of the 11th section, and recovered, this would have been within that meaning. Comparing the language used in the 11th section with the language used in the 12th and 13th, these learned judges have decided that the plaintiff has not recovered the 20*l*., and the money out of court is not within the meaning of the 11th section.

upon the law as it stands, and sued for a sum over 20*l*. defendant pays in a sum under that, and if he took away out and put himself in jeopardy of losing the costs of an, it put him in an unfair position, because you might have a case of a man suing for 21*l*. or 22*l*., and the plaintiff pays 19*s*. and he goes on and puts himself and the other party in the expense of a trial; that would be a wrong thing to do, and he would be bound to do it to have it in his power to pay his costs. He would be compelled to go on unless he is liable to a forfeiture of the whole costs. Whereas, if so as admitted to be due, the defendant's course is, before he ought, to tender that amount, and then he would put himself into a different position, because, then, the issue would be *repleaded* and tender. It seems to me, therefore, that there is no ground for disturbing what has been already decided, and that the plaintiff's *allocatur* is right; and therefore there will be no

CHAMBERS

v.

WILLES.

1855.

*Payment into  
court of less  
than 20*l*.—  
Taking out same  
in full  
satisfaction—  
Costs.*

*Rule refused.*

May, 1855.

LUCAS v. THE EXECUTORS OF ROBERTS

*Attorney's bill of costs—Delivery, how a*

*An attorney's bill of costs, duly signed, but not addressed to the debtor or charged, was put into an envelope which was put into the post-office at Wem, and forwarded :*

*Held, under the circumstances, that the bill and envelope together, that it was enough to constitute a good attorney's bill, and satisfied the statute.*

THIS was an action brought to recover the costs alleged to be due to the plaintiff upon a bill of costs, which was tried before the judge of the County Court at Wem, on the 18th December, 1854.

The plaintiff claimed 42*l.* 4*s.* 10*d.* The representatives of the defendants, and that their testators admitted.

The plaintiff was surviving partner in the late firm of "Roberts and Lucas," who carried on business at Wem as solicitors.

On the 11th August previously, duplicates of bills of costs numbered 1, 2, 3, were signed by the plaintiff and inclosed in an envelope and put into the post-office at Wem, addressed to "Mr. Robinson, 46, Brunswick-road, Liverpool," the same day plaintiff's clerk also left duplicates of the same bills signed by plaintiff, in an envelope, at defendant's residence, Mr. Roberts, in Wem, with his servant he being addressed to "The executors of the late Mr. J. Roberts."

ll No. 3, being the costs of obtaining the bankrupt's certificate, headed and signed in same manner as bills Nos. 1 and 2.

o letter or note accompanied the bills, and neither the names e defendants nor their testator were mentioned either at the or in any part of the said bills.

o duplicates or copies were sent to the other defendant, Mr. i Roberts.

ie judge refused to nonsuit, and it appeared by the evidence in September, 1848, plaintiff, and his late partner Samuel msley, were applied to by one John Robinson, a cheese-factor g at Leighton, near Nantwich, to take out a fiat in bankruptcy ist him on his own petition, which they consented to do on ving the following guarantee:—"To Messrs. Walmsley and us, In consideration of your issuing a fiat in bankruptcy ist John Robinson, late of Leighton, in the county of Chester, eefactor: I hereby undertake to pay the expenses of such eedings in case the estate of the said John Robinson shall not efficient to discharge the same, and not to exceed the sum of

Witness my hand this 25th day of September, 1848, John erts." James Bolderston being appointed trade assignee, he a retainer to Mr. Wm. Kennys Tyrer, solicitor, Liverpool, as olicitor. Bolderston died, and the assets received under the ruptcy amounted to 82*l.* 4*s.* The sum applicable to the itor's bill of costs amounted to 47*l.* 15*s.* 2*d.* Tyrer stated in ence, that although he was appointed solicitor to the assignees, e was an understanding between him and Walmsley and as, that upon the conclusion of the business the profits should ut together and divided.

ill No. 1 on the file of the Court of Bankruptcy at Liverpool aded thus:

Walmsley and Lucas, Wem, Salop, Solicitors; Tyrer, Liver- , Agent. In the matter of John Robinson, a bankrupt. tioning creditors' costs up to the choice of assignees taxed at 4*s.*"

tyrer had received 37*l.* 15*s.* 2*d.* on account of Bill No. 1; and sum of 10*l.* remained in the hands of the official assignee, licable to the solicitor's bill of costs.

ill No. 2, on file of the same court, was headed thus: "Tyrer, erpool, Solicitor. *Re Robinson.* Bill of costs to meeting for ificate, taxed at 18*l.* 8*s.* 9*d.*"

The County Court judge determined that there was a sufficient ivery of the bills; that the guarantee extended to bills Nos. nd 2; that the guarantee did not extend to the certificate bill . 3; that plaintiff was entitled to recover the balance due on s Nos. 1 and 2; that the balance then due to plaintiff on bills a 1 and 2 was 22*l.* 18*s.* 5*d.*, for which sum he gave judgment. ray, for the appellants, contended—first, that there was no icient delivery of the bill of costs; secondly, that bills of costs vered under the Attorneys and Solicitors Act should show t party is to be charged; thirdly, that the appellants are not

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v.  
EXORS. OF  
ROBERTS.  
—  
1855.

Attorney's bill  
—Delivery—  
Address.

the judgment of WIGHTMAN, J., read that within the meaning of the Attorneys and Solicitors Act, 1846, no way shows who is the debtor. The questions of the court were—first, was there a good defence to Bills Nos. 1 and 2? secondly, are the defendants liable on the guarantee in respect of Bills Nos. 1 and 2? ought the payment charged to have been paid 11*l.* 8*s.*, or any part; if so, how much to be dis-

*Phipson* for respondents.—The plaintiff's delivery of the bill of costs was sufficient. That the testator John Roberts was a collateral creditor on the insufficiency of the estate of the bankrupt; that he charged the costs incurred, and therefore that the bill was made out in the form in which it was delivered to Mr. Roberts as a principal debtor. That the bill extended to Bills Nos. 1 and 2, and that the proper party to recover the balance due on both the Bill No. 2 was incurred to Mr. Tyrer, an agent, and Lucas. That the 11*l.* 8*s.* was properly allowed of the Bill No. 1, Mr. Walmsley being himself liable for the amount was due for expenses, independent of whether any payment had been made to him on account of his disbursements: (*Bank of England v. Bell*, 3 Bing. N. C. 589, 600; *Cosens v. Graham*, 21 L. J. 100; [POLLOCK, C. B.—There seems to be a case of *Jones's Exch. Ir. Rep.* 513, to the effect that under the statute (similar in this respect to the English statute) the bill should have been addressed to the defendant.—Yes; both parties were aware of that case and ought to have been brought before the attention of the court.—*Phipson*.—In *Phipps v. Daubeney*, 20 L. J. 273

arged, and properly sent or delivered. I think, under the circumstances of this particular case now before the court, it was sufficient. According to the Irish case, it would not be, but that in particulars differs from the present. Suppose it had been a letter put into an envelope directed and put in in the same way as this bill was, that letter would have been sufficiently addressed; and why not this bill? The envelope and inclosure are to be read together; and as we think there was a good delivery of the bill, the judgment of the court below was correct. As to the second question I am of opinion defendant is not liable to Bills Nos. 1 and 2; no business was done by another person on the retainer of a different individual. In answer to the third question we are of opinion it ought to be allowed, and considered as being settled in account. The allowance of 3*l.* a-day for three days for a distance of forty-eight miles is exorbitant; it should be reduced from 3*l.* a-day to 10 guineas.

PARKE, B.—The bill inclosed in an envelope addressed to the defendant is sufficient, I think, taking the bill and letter together, to satisfy the statute. In reference to the observation, it would appear from the report, that I made upon the Irish case of *Manly v. Glyn*, in *Phipps v. Daubeney* in the Ex. Ch., perhaps I did not pay quite so much attention to it as I should have done if it had been requisite to the decision of the points then before the court. I do not say it is wrong or correct, but merely if it should again arise, I should like to reconsider it. As to the other questions in this case, I concur with the Chief Baron.

LATT, B.—concurred.

MARTIN, B.—I think the bill and envelope satisfy the statute.  
*Judgment for the defendant.*

LUCAS  
v.  
EXORS. OF  
ROBERTS.

1853.

*Attorney's bill*  
—*Delivery*—  
*Address.*

May 22, 1852.

LAKE v. BUTLER.

*Jurisdiction—Distance between the dwelling of plaintiff how to be measured.*

*The proper mode of ascertaining whether the plaintiff is twenty miles from the defendant, according to the County Court Act, is by measuring in a straight line from point to point.*

A RULE had been obtained calling upon the plaintiff to show cause why an order of Wightman, requiring the plaintiff to pay his costs, should not be rescinded. Whether the plaintiff dwelt more than twenty miles from the defendant, so as to give the Superior Court jurisdiction over the case, with the County Court under sect. 128 of the County Court Act, c. 95; and that depended on the mode of measuring the distance by the road was to be taken, it excepted that if measured in a straight line from one point to another, it was under twenty miles.

*Hayes* showed cause.—The distance should be measured in a straight line. In *Stokes v. Grissell*, 14 C. B. 101, and *Maule, J.*, expressed a strong opinion in favour of measurement, approving of the *dictum* of *Pearson, J.* in *Hind*, 9 B. & C. 774; and *R. v. Saffron Walden*, decided upon sect. 68 of the Poor Law Amendment Act, 1834, in point. In many recent acts of Parliament the straight line has been adopted. Under the Reform Act the rule was adopted: but the Registration Act, 6 Vict. c. 18, s. 1, requires the distance to be measured by the road.



*Voods v. Dennett*, 2 Stark. 89.) According to the measurement of the road the distance would be perpetually fluctuating; and at the same point might be one day beyond and the next day within the limit. Nor is there anything in the purpose of the enactment to prevent the adoption of the more convenient rule. The distance of twenty miles has no reference to the extent of the jurisdiction, but is a purely arbitrary limit for the purpose of preventing the hardship of a man living in Northumberland being obliged to be brought to a County Court in Cornwall. [COLERIDGE, J.—It must surely have had some object involving communication between the parties.] It is difficult to see what the process is served by the bailiff of the court, which may be more than twenty miles distant from the defendant's residence. *Watson* contra.—Notices to produce and the like are given to one party to the other; and the object of this enactment is to reserve the Superior Court concurrent jurisdiction in cases where the parties live at an inconvenient distance from one another. The mode of access from one to the other therefore is the matter to be considered; and the distance must be measured by the nearest road. [COLERIDGE, J.—But what road?] The nearest horse-road would be proper considering the distance; but if not that, then at all events the nearest foot-road. The inconvenience also of measuring in a straight line across country would be very great; and yet, to ensure accuracy, that would often be necessary. [Hawk. P. C. lib. 1, s. 15, it is said that under the Five Miles Act, the measurement should be by the road; and *Wing v. Eagle*, 11 Eliz. 212, 267, is cited. [Hoyes.—In that case the straight line was adopted.] In *Athyns v. Kinnier*, 4 Exch. 776, Parke, B. seems to consider that his own dictum in *Leigh v. Hind* could not be supported; and in *Stokes v. Grissell* the observations of Bower, J. and Williams, J. point rather to an opinion against measurement in a straight line. *R. v. Saffron Walden* was decided upon the ground that there was nothing in the statute to bind the court in its determination as to the mode of measurement. There is no difficulty raised by the supposed fluctuation of distance, because the question is whether, at the time of commencing the action, the plaintiff dwells more than twenty miles from the defendant.

ORD CAMPBELL, C.J.—I am of opinion that the distance should be measured in a straight line on a horizontal plane from point to point. The words of the section are quite general: "where the plaintiff dwells more than twenty miles from the defendant," without specifying how the distance is to be ascertained. We are then to consider what is the meaning of the Legislature; and I think we may well consider that the Legislature intended that mode of calculation which is the most convenient and the most certain. If the distance is to be ascertained by the mode of communication, see what uncertainty arises. Shall it be by the carriage-road, or the bridle-road, or the foot-road? Sometimes the mode of access is by water; and if it

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v.  
BUTLER.  
—  
1855.

Jurisdiction—  
Distance, how  
to be measured.

*n. v. Saffron Walden* is an authority expressed by which we ought to abide; especially after the opinions of two judges of the Court of Common Law judges not dissenting. Those opinions had reference to this very act of Parliament now under consideration and by that construction we abide.

COLERIDGE, J.—I have entertained consideration of this question; and my mind even now is not fixed about it. This is not the case of the definition of the common centre, where I agree that measurement is the most natural mode; but here the question is a different one, under what circumstances are parties entitled to recourse to it? and it seems to me that the parties had reference to the convenience of communication and party. I cannot otherwise understand the enactment; and regarding it in that view I shall adopt a popular interpretation of the language in the sense in which a farmer or other person in the neighbourhood would understand it. If such a person were plaintiff or defendant, dwelling more than twenty miles from the common centre, would at once think of the road by which he would travel, however, admit that the other rule is by far the better, and tends to raise fewer questions; and find in favour of it. I raise any such distinction between this case and *Walden* as ought to lead to any different conclusion. I better in such a case to adhere to a rule once established on that ground am prepared to concur with the majority in the decision of this case.

ERLE and CROMPTON, JJ., concurred.

## COURT OF COMMON PLEAS.

*June 4, 1855.*

SHEPHERD v. BAKER.

*Defendant moved for a rule to enter a suggestion to deprive the plaintiff of costs under the stat. 15 Vict. c. 27, upon an affidavit that the plaintiff lived at 5, Erle-street, and the defendant at the Isle of Dogs, which two respective places are not more than seven miles*

*apart, no one could doubt that the affidavit meant that the two lived seven miles apart, and that it was therefore sufficient.*

*The rule was obtained on the 9th May. Judgment was signed on the same day that the rule was obtained. Judgment might have been signed on the 23rd.*

*The final judgment not being signed, and the costs not being taxed, the defendant was in time.*

THE rule had been obtained by *Henniker*, calling upon the plaintiff to show cause why a suggestion should not be made to deprive him of costs, under statute 15 Vict. c. 27 (the 27th section).

He now showed cause.

The defendant's affidavit states that the plaintiff resides at 5, Erle-street, and the defendant in the Isle of Dogs, "which two places are not more than seven miles from each other." The distance from the part of the Isle of Dogs may be more than twenty miles from the part of Erle-street, and their affidavit should have stated that the distance from the place where the plaintiff resides to the place where the defendant resides is less than twenty miles. [JERVIS, C. J.—No one can doubt that the affidavit means that the two live only seven miles apart.] Further, the defendant is too late. The verdict was signed on the 9th May and judgment might have been signed on the same day. Judgment was signed on the 25th, before the rule was obtained. The rule was obtained on the same day. He should have applied for judgment on the 9th. (*Hippesley v. Layng*, 4 B. & C. 863; *Calvert v. Calvert*, 5 M. & W. 510.)

JERVIS, C. J.—Here only interlocutory judgment has been given, not final, the costs not having been taxed.

*Rule absolute.*

*Powers of County Court judge to commit upon judgment a discharge under the Insolvent Debtors Act—c. 95, ss. 98 & 99; 1 & 2 Vict. c. 110, s. 75.*

*Abley v. Dale, 11 C. B. 378, considered and confirmed. On the 7th March judgment was obtained against the defendant in the County Court. On the 27th April the defendant was discharged under the Insolvent Debtors Act from debts among which the County Court was scheduled. On the 10th May judgment-summons were issued against the defendant.*

*Held, that the judge of the County Court had no power to commit the defendant after the discharge under the Insolvent Debtors Act. Held, also, that the judgment of the judge of the County Court was final in the matter, and that the application for a writ of habeas corpus for the defendant should have been made to him.*

THE applicant, an insolvent, had been committed to the County Court on the 10th May, 1855, by the judge of the County Court at Rochester, upon the hearing of a judgment-summons. Judgment had been obtained on the 7th of March 1855, and on the 27th of April the defendant was discharged under the Insolvent Debtors Act, the judgment-debt being included in the schedule.

Francis moved upon the above facts for a writ of habeas corpus from the judge of the County Court, and the plaintiff in the County Court asked the cause why the order of the judge should not be made for the applicant released from custody. Application was made to the Court of Queen's Bench, which refused to interfere on the authority of this court in *Abley v. Dale*. I submit that the 90th section of 1 & 2 V.

with the permission of the court I will ask for a rule for *habeas corpus*. [JERVIS, C.J.—How can you ask us to overrule *Abley v. Dale*, fortified as that decision is by the Court of Queen's Bench?] The Court of Queen's Bench would not go into the question. I am helped by the subsequent case in this court *Swann v. Dakins*, which decided that the Queen's chaplain was entitled to his discharge on the ground that a commitment by judge of County Court upon a judgment-summons is not *pœnam* but a qualified satisfaction. Here the discharge, under the Insolvent Debtors Act, is a satisfaction of the debts in the schedule, and the applicant is entitled to his discharge. JERVIS, C. J.—In *Swann v. Dakins* the applicant was entitled to protection against every step which led to satisfaction, whereas the Insolvent Debtors Act only gives protection against a debt completely satisfied. MAULE, J.—In *Swann v. Dakins*, the privilege of the privilege of Her Majesty.] Yes, and here the privilege of the privilege of the other creditors who would be defrauded if the applicant were to release himself by paying this debt. [JERVIS, J.—A friend may be induced to come forward.] But your lordships having decided that the commitment is not *in pœnam*, and satisfaction being by the Insolvent Debtors Act only, why should the applicant be imprisoned for forty days for the purpose of compelling a satisfaction which cannot be made? [MAULE, J.—

*Swann v. Dakins* we held the commitment to be a qualified satisfaction, supposing it to be partly penal; it only says that the privilege of the creditor to imprison is subordinate to the privilege of Her Majesty. The imprisonment is grounded on something more than the debt. It is the misconduct of the debtor, and that is untouched by the Insolvent Debtors Act. The County Court case was subsequent to 1 & 2 Vict. c. 110; and although that act released the debtor in all cases, the subsequent act might still in some cases subject him to imprisonment. Suppose it had said he should be imprisoned, notwithstanding anything contained in the previous act.]

JERVIS, C. J.—All your points were put in *Abley v. Dale*, which, after being carefully considered by us, was decided with the concurrence of several other judges. I think there is no ground of distinction in this case from *Abley v. Dale*, and that that case is overruled by *Swann v. Dakins*; and I am also inclined to think, independently of that, that the application should be to the judge of the County Court, and that his decision is final, and that we could not grant a *habeas corpus*.

MAULE, J.—If there were a court of appeal from County Courts, it is clear the appeal here would be to that court. There is no such court, and that shows that there are some things which were intended to leave to the County Court judge. I have given out my opinion as to the general question already. BRESSWELL and CROWDER, JJ., concurred.

*Rule refused.*

[See the next case.]

GEORGE  
v.  
SOMERS.  
—  
1855.

Commitment—  
Judgment  
summons—  
Discharge by  
Insolvent  
Court.

GEORGE v. SOMERS.

*County Court judgment—Discharge by Insolvent  
under 9 & 10 Vict. c. 95, s. 99*

*A summons in the County Court was issued by A. a  
ment obtained, afterwards B. was arrested at th  
ditor, and obtained his discharge under the In  
having inserted the judgment obtained in the  
schedule. Subsequently A. took out a judgment  
9 & 10 Vict. c. 95, s. 98, and the judge committe  
Held, that the discharge of B. under the Insolvent  
the County Court judge the power to commit and*

**G** FRANCIS moved for a *habeas corpus* to  
of the defendant. The application had  
fused by the Queen's Bench and Common I  
the defendant was summoned to the County  
March: judgment in the County Court for  
execution. On the 2nd April the defendant  
suit of another creditor, and on the following  
the Insolvent Court, and on April 28th he rec  
the judgment of the plaintiff having been in  
dule. On the 10th May a judgment-summons  
the 98th section of 8 & 9 Vict. c. 95, and  
attention of the judge of the County Court  
discharge by the Insolvent Court, but he proce  
defendant for forty days. Subsequently an ap  
to the judge for his discharge and refused by  
contended, first, that this is not an "unsatisfie  
the 99th section of the act; a judgment for a

contended that that case was not conclusive to bind the other parts; that the Court Baron had expressed a modified opinion upon the subject in the case of *Ex parte Dakins*, 1 Jur. (N. S.) 378.)

MARTIN, B.—I think the judgment in *Abley v. Dale* is right. I think, if the power of committal given to the judge of the County Court by the 99th section related to a man's property solely, you could have a case; but under this section a committal may be made when a man has no property at all. Over property alone the Insolvent Court adjudicates; but where you find that the judge has a power of committal for refusing to be sworn, or for obtaining credit on false pretences, or by means of fraud or breach of trust; over these matters how can the insolvent discharge operate? The defendant would be put twice in peril for the same matter. The plaintiff appeared before the Insolvent Court and opposed. [POLLOCK, C.B.—*Non constat* that the ground of committal was gone into before the Insolvent Court. It is not suggested the matter for which he was committed by the County Court judge was gone into before the Insolvent Court; it might have been, you say; but there is nothing to show it. MARTIN, B.—Surely, after the case of *Abley v. Dale*, and the refusal of the Queen's Bench and Common Pleas to go into the matter, we are also bound by it, and you must bring your action. POLLOCK, C.B.—In the report of the case cited in the *Jurist*, it only says *Abley v. Dale* was cited; but as to what was said in the case, or what use was made of it, it is quite silent. Neither was it necessary in that case that the court should overrule *Abley v. Dale*; that case might be decided solely on the ground of privilege.] But it is there distinctly said that this was a qualified execution. [POLLOCK, C.B.—I see nothing inconsistent in the two cases; but, if it be necessary to knock down either, I should rather hold to the case of *Abley v. Dale*.] Without saying 9 & 10 Vict. control 1 & 2 Vict. c. 110, effect may be given to both; the judge was bound, by the 90th section of the former act, to discharge the defendant as soon as his attention was called to it.

MARTIN, B.—I think we are bound by *Abley v. Dale*; but I think I say I think much might be said on the subject, and shall leave myself at liberty to reconsider my views, if brought before me in error.

GEORGE  
v.  
SOMERS.  
—  
1855.

Commitment—  
Judgment  
summons—  
Discharge by  
Insolvent  
Court.

*Rule refused.*

June 9, 1855.

JACKSON v. BEAUMONT.

*County Court jurisdiction—Goods ordered in one  
in another—Prohibition.*

*Where goods were ordered at Leeds and delivered.  
Held, that no cause of action arose within the  
Court of Leeds, so as to give the judge of that co  
action brought there for the price of them, sect. 61  
applying only when the whole cause of action ar  
The fact of a defendant applying for and obtaini  
against a decision of the County Court judge, u  
in his adjudication, so as to disentitle him to a w*

**T** JONES showed cause against a rule cal  
tiff to show cause why a writ of pro  
issue to restrain the judge of the County C  
holden at Leeds, from proceeding any furthe  
appeal had also been lodged in this case, w  
unnecessary to argue. The plaint was for 21  
due as the balance of an account of 76l. 3s.  
was by a jury, on the part of the plaintiff  
duced to prove the sale and delivery of the g  
dant produced a consignment note, signed  
show that the transaction was one of consign  
sale; but the plaintiff alleged that his signat  
been obtained by fraud, and the County Court  
jury to say if there had been any fraud. D  
then contended, that there was no cause of  
jurisdiction of the court, and that the plaint  
he nonsuited. it appearing that the defenda



d, that the goods were to be delivered at Leeds or at Manchester; and the jury thereupon found for the plaintiff. It was now contended that this writ ought not to go, the defendant having acquiesced in the jurisdiction of the judge by applying to him to state a case for appeal. Admitting, for the sake of argument, that the defendant may elect, he has chosen to appeal, and thereby put the plaintiff to much expense, and cannot now come and ask for a prohibition. The writ of prohibition is not a matter of absolute right, otherwise it would be granted on application of course; and if the defendant were even entitled to it, he has forfeited his right by acquiescence: (*Marsden v. Wardle*, L. J. 263, Q. B.; *Borthwick v. Walton*, 24 L. J. 83, C. P.; *uggin v. Bennett*, 4 Burr. 203; *The Bishop of St. David's v. Gray*, 1 Ld. Raym. 545; 9 & 10 Vict. c. 95, ss. 58, 59, 60, were referred to.)

*Edwin James*, Q. C. (*C. E. Pollock* with him), contra, were not heard on.

**ALDERSON, B.**—I think the writ of prohibition ought to go. It seems to me that the defendant has in no way acquiesced; on the contrary, he persists in objecting to the jurisdiction of the judge from the beginning to the end; and I think it clear that there was no jurisdiction. The whole cause of action must arise within the district of the County Court, and here it is clear that the whole cause of action did not arise within the district.

**PLATT, B.**—Unless we construe a uniform protest against the jurisdiction to be acquiescence, we cannot say there has been anything here approaching to it.

**MARTIN, B.**—I am of the same opinion. The writ of prohibition is a writ of right, like *mandamus* and *quo warranto*; here there was no acquiescence, unless it be such acquiescence as an attorney may give when he is opened. I think, on the statement of the judge himself, he had no jurisdiction.

**ALDERSON, B.**, read from Wilmot's notes, p. 82: "A writ which issues upon a probable cause, verified by affidavit, is as much a matter of right as a writ which issues of course." I believe that is good law, and I am sure it is excellent sense.

JACKSON  
v.  
BEAUMONT.

1855.

Jurisdiction—  
Delivery of  
goods—  
Prohibition.

*Rule absolute.*

## GUARDIANS OF THE POOR OF HERTFORD U1

***Jurisdiction—Certiorari—Recovery of expenses inc  
Vict. c. 123, in County Court.***

*The amount paid for enforcing an order made by 11 & 12 Vict. c. 123, for the abatement of recovered from the owner of the premises in the the 3rd section of that act, even though title to lan*

**WILLES**, for the defendant, showed cause to quash a *certiorari*, and that a writ of issue.—A plaint had been entered in the County of 37*l*. 11*s.*, recoverable under the 11 & 12 V. carrying into force an order of two justices to a ditch. That statute is an act “for the more certain nuisances,” &c., and the 3rd section enacts any such order as aforesaid for cleansing, whitening any dwelling-house or building, or for the removal of any such cause or causes of complaint. When obtained, all costs and expenses reasonable in obtaining such an order, or in carrying the same into effect, are deemed to be money paid to the use and at the disposal of the owner or occupier of the premises in respect of which the same order and expenses shall have been incurred, and in such “in any County Court” or “before the Court of Quarter Sessions.” The question here is, whether that clause of the act excludes the jurisdiction of the County Court and the justices exclusive jurisdiction, and vests it in the Superior Courts of any jurisdiction. I contend that the act does not exclude the jurisdiction of the County Court as to title to land is in question, although the case is *Campbell, C. J. and Crompton J., in the case*

e statute, inasmuch as the justices, by their order, find that the nuisances complained of are upon or adjoining the premises of the defendant.

*Lush* contra.—In this case the Superior Court has no jurisdiction; it is a rule of law that where a statute creates an obligation, and points out the mode of enforcing it, that is the only mode [he said the section]. Here the amount of the claim is 37*l.* 11*s.*, but might have been for an unlimited amount; this clause, for the purpose of this act, extends the jurisdiction to any amount.

ALDERSON, B.—“May be recovered,” you say, is to mean *shall*,” when such a construction is for the public benefit, otherwise it is to mean simply “may.” If the plaintiffs had gone to the justices instead of the County Court, which they might have done, it could not then be removed. The order is in the terms of the act, schedule (C), and is an order on the owners of the premises; and the expression “upon or adjoining” is a mere description. What could we do with it if it were removed? Here the statute points out a remedy in such a case, and two judges of

Queen's Bench are of opinion that this clause is intended to take the jurisdiction of the Superior Courts. We must be governed by the mode of trial directed by the act; and when jurisdiction is given to another tribunal, we cannot get it incidentally. I think the Legislature meant it to be a summary jurisdiction.

*Rule absolute.*

GUARDIAN  
OF  
HERTS  
UNION  
v.  
KIMPTON  
—  
185  
—  
Jurisdiction  
Certiorari

BROOK v. CHAPLIN.

*Insolvent trader—Debtor—Protecting order—Dis-  
Description of debts in schedule—Judgments on 1*

*A trader who had given a warrant of attorney for judgment had been signed, and execution levied thereon afterwards obtained a protecting order from the Court under stats. 5 & 6 Vict. c. 116, and 7 & 8 Vict. c. 96. He inserted the plaintiff's debt as amounting to £1000 in a memorandum explaining that the consideration for the attorney was in fact only 70l., and that goods to the value of 1000l. had been seized under it. Upon an application to the Court for a writ of *fi. fa.*:*

*Held, that the protecting order could only be impeached in the Court, and must be treated as a valid order of the Court; that in this case, if there was any mistake it was such as might have been amended under the Act, and consequently the defendant was discharged as to the debt. Semble, that if the debt had not been scheduled in the schedule, it would have been discharged under sect. 21.*

A RULE had been obtained calling upon the defendant to show cause why the writ of *fi. fa.* issued in this case should not be set aside. It appeared from the affidavits that the defendant gave the plaintiff a warrant of attorney for judgment, which judgment was signed, and a writ of *fi. fa.* issued thereon following. The writ was indorsed to levy 1000l. In fact, only 35l. 3s. 6d. was levied. In June 1889 the defendant presented his petition to the Court of Bankruptcy, in which debts were under 300l., and obtained an order for discharge under 5 & 6 Vict. c. 116. and 7 & 8 Vict. c. 96. In the

cation also gave the same version of the transaction, and the tance of it was not denied by the affidavits on the other side. as sworn, however, by the plaintiff and his attorney, that they ved that they had received no notice of the defendant's appli- n to the Bankruptcy Court for protection.

*Worlledge* now showed cause.—Under the 5 & 6 Vict. c. 116, protecting order operated to discharge the petitioner from prior s whether scheduled or not; but by sect. 22 of 7 & 8 Vict. i, the discharge is limited to scheduled debts: and in this case plaintiff's debt was not scheduled. It is true that by sect. 30 e is a power to correct a mere mistake in the schedule, not ng from culpable negligence, fraud or evil intention; but there t have been evil intention in describing a debt of 70*l.* as one of especially considering that if the full amount had been inserted, defendant could not have petitioned at all, because his debts ld then have exceeded 300*l.* At all events the order could not ate as a discharge beyond the sum of 20*l.* mentioned in the dule, because the plaintiff could prove for no more than that nt: (*Phillips v. Pickford*, 9 C.B. 459; *Taylor v. Buchanan*, . & C. 419; *Tyers v. Hunt*, 7 Scott, 349.) [ERLE, J.—But Legislature having a vehement suspicion of warrants of at- ey, provides by sect. 21, that after the petition, a judgment i a warrant of attorney shall not be available against the or who is protected, but that the person who has signed the ment may come in as a creditor.] Unless the debt is scheduled reditor has no notice of the proceeding. [Lord CAMPBELL, —Personal notice is unnecessary. He has the notice given to ybody by the advertisements.]

*Worlledge* and *Wroth* contra.—The defendant denies that there is any curacy of statement in the schedule; but if there was, there o suggestion in the affidavits of fraud, or evil intention, or able negligence; and, under sect. 30, the commissioner would e amended the schedule by inserting the proper amount. ides, sect. 21 is quite general, and applies whether the debt is duled or not: (*Parrott v. Congreve*, 16 Sim. 579.)

Lord CAMPBELL, C.J.—I am of opinion that this rule should made absolute. It seems to me, looking at the intention of the islatute, and at the facts appearing on these affidavits, that the atiff cannot avail himself of the warrant of attorney, and re- r the amount by means of the writ of *fi. fa.* issued thereon; that his only remedy is to prove and take a dividend along with other creditors. Mr. *Worlledge* has said that by reason of l the proceedings taken for obtaining protection were void *ab* ; but I am clearly of opinion that if the order for protection be impeached, it must be impeached in the Bankruptcy Court; that we must consider it valid until it has been set aside by Court. Now it is said, that in this case the schedule filed by defendant is untrue, by reason of culpable negligence, fraud il intention—but the affidavits do not expressly make any charge; nor, in my opinion, do they state facts which would

BROOK  
v.  
CHAPLIN.  
—  
1855.

*Insolvent  
trader—  
Protecting  
order—  
Discharge from  
debts—  
Warrant of  
attorney.*

of fraud altogether fails. As at present adv  
opinion that, under sect. 21, the plaintiff could  
of the warrant of attorney for the purpose o  
upon the judgment signed thereon, even if the  
from the schedule.

CROMPTON, J.—It appears to me that this  
within sect. 21, but I also agree that it would  
say that any fraud or culpable negligence is m

COURT OF EXCHEQUER.

April 28 and May 8, 1855.

KEMP AND ANOTHER v. HURRY.

*Insolvent—Description of debt in schedule.*

*Defendant gave his bill of exchange to A. for 26l. 7s. 6d. A. passed the bill to the plaintiff without defendant's knowledge. A.*

*Defendant became insolvent, and in his schedule described the bill as a 30l. bill due to the representatives of A. (stating who they were); plaintiffs had notice of the insolvency and all the other*

*circumstances that the bill was misdescribed in the schedule, and notwithstanding defendant meant to give an account to every one that he owed to be creditors to him at the time, he was still liable, after his discharge under the Insolvent Act upon that schedule, to pay the amount of the bill of exchange so misdescribed.*

**DECISION** by indorsee against the acceptor of a bill of exchange dated 19th October, 1853, payable at three months after date for 26l. 7s. 6d. The defendant, subsequently to his giving the bill, had taken the benefit of the Insolvent Debtors Act, and in his schedule described the bill and its amount, &c. in this form:—*representatives of Messrs. Wright and Co., varnish merchants, late of 134, High Holborn, are Messrs. Wallis, varnish merchants, Long Acre—30l. admitted for varnish; when discharged, 1852 and 1853, for varnish, &c., ex-partners' late of Wright and Co. These creditors hold a bill of exchange for 30l. and the bill is drawn by self and partner, and afterwards renewed by self and partner.*

The verdict at the trial passed for the defendant; and a *judgment nisi* having been obtained to set it aside and enter it for the defendant on the first replication, for the amount of the bill mentioned in the declaration and the costs thereof, on the ground, that upon the evidence such issue was proved for the defendant; first, that there was evidence to go to the jury on such issue in favour of the defendant, or for a new trial, if the court should think otherwise;

**Per, Serjt. and Beasley** showed cause.—The question is, whether the bill of exchange mentioned in the declaration is lawfully set forth in the defendants' schedule filed under the

*Miller, Serjt.*—The only object of the act of give parties information of the debtor's being benefit of the act; here the plaintiff actually c and it was so proved in evidence—that i (*Foreman v. Drew*, 4 B. & C. 15; *ib.* 20 and 2 —The bill was in fact a 26*l*. bill—it is described a 30*l*. bill. ALDERSON, B.—We may say perhaps to be set forth, but that is all; we cannot say it The question is entirely a question for the whether it is substantially set forth. [ALDERSON conjecture it was set forth; but is that enough for 30*l*. was described as a bill for 30*l*. 1*s*. [N would not do.] It would be for the jury to say were misled as to opposing the insolvent; here evidence that the plaintiffs had due notice t misled, and gave the defendant the verdict in cor v. *Blower*, 14 M. & W. 387; *Lewis v. Mason*, *Jervis v. Jones*, 4 Dowl. 610.)

*Lush.*—The point was not taken in *Lewis v.* been a recent decision of this court as to w description in an insolvent's schedule of a bill o v. *Beverley*, 11 M. & W. 845, confirmed by *La C. & B.* 358.) As to *Jervis v. Jones*, that has two cases: (*Leonard v. Barker*, 15 M. & W. 207 Scott, 349.)

JUDGMENT.—*May* 8.

PLATT, B.—This was a rule to set aside t defendant on the first replication and to ente the plaintiff for the amount mentioned in the



It appears that, in that case, the action was brought to the amount of a bill of exchange for 26*l.* 7*s.* 6*d.*, of which intiffs were the indorsees and the defendant was the ac-

The defendant Hurry had been a painter and glazier on business in the name of Havell at Kingston; the same had given an acceptance for 26*l.* 7*s.* 6*d.*, to Messrs. Wright, in oil and turpentine, in High Holborn, without the know- of Hurry his partner; they afterwards absconded; the bill due, and it stood over for some time. At last, on the ap- on of the party who conducted the business of Wright and Hurry was induced to give another acceptance in lieu of the one, and for the same money. Soon after that he fell into ty, and was obliged to take the benefit of the Insolvent s Act; and, after he had so taken the benefit of the Insol- Debtors Act, this action was brought for the purpose of ring the amount of the bill of exchange from him as the or of it; and he, upon that occasion, set up his discharge the Insolvent Debtors Act. And the question for the court sider was, whether this bill was properly described in the le, which was produced at the trial in order to support the a behalf of the defendant. The sum of money for which was given was 26*l.* 7*s.* 6*d.*, and the mode in which the debt scribed by the defendant—who, it was quite clear, meant to account to every one that he supposed to be creditors to the time—he was not aware that this bill of exchange had avelled out of the hands of Wright and Co.; and having so ed this in his schedule, and finding that Wright, who was nager of the business in High Holborn, had died, and the ss had ceased to be carried on, he described the debt thus in edule:—"The representatives of Messrs. Wright and Co., merchants, late of 134, High Holborn, are Messrs. Wallis, manufacturers, Long Acre." (That really had the appear- an agency of Wright and Co.) "30*l.* admitted for varnish. creditors hold a bill of exchange for 30*l.* and upwards, drawn and partner, and afterwards renewed by self." Now, the of the act of Parliament, which stood in the way of the nt, are contained in the 22nd section of the 7 & 8 Vict. c. 96, ere the persons who are to be barred by a discharge under solvent Act are those who may be indorsees or holders of gotiable security set forth in the schedule. It therefore was tion whether this 26*l.* 7*s.* 6*d.* acceptance was set forth in the le. So far from being set forth in the schedule, the bill hich the action was brought was accepted by the defendant, scribed as being drawn by him. Instead of being 26*l.* 7*s.* 6*d.* ated to be for 30*l.*, and, therefore, there is nothing upon the this description which would lead any party to the bill in n, or which would enable any one reasonably to say that it : forth on the face of the schedule. It is much to be lamented was not more correct, because the party who brought this was aware that the defendant was about to take the benefit

KEMP  
v.  
HURRY.  
1855.

*Insolvent—  
Description of  
debt in schedule.*

bill that is sought to be discharged by means of  
ment, which seems to me to allow much, as at  
for matters of this sort, which would put the  
dence, and would lead to great inconvenience.  
because no doubt the man meant honestly to  
about the circumstance; but I apprehend then  
in writing to show that the discharge is made  
which is the subject of the action.

POLLOCK, C.B.—I was in the Criminal Court  
time the case was argued. Therefore I give no

PARKE, B.—I was in the same court, but I  
my brother Platt has said.

PLATT, B.—I have the authority of my brother  
express his opinion also to the same effect.

## VICE-CHANCELLOR WOOD'S COURT.

*May 23, 1855.*

TUDWAY v. JONES.

*Practice—Plea—Insolvency—Stat. 1 & 2 Vict. c. 110.*

*Where an insolvent debtor who has petitioned the Court for Relief of Insolvent Debtors is discharged out of custody without adjudication, and without a dismissal of his petition, and with the consent of his retaining creditors, such discharge does not avoid the vesting order of his estate and effects; and, therefore, such insolvent debtor is not in a condition to sue as plaintiff in respect of any part of his property; a plea, therefore, of his discharge under such circumstances, and that no order has been made revesting his estate and effects, is good.*

THIS was a plea to a bill for an account. The bill was filed by Mr. Clement Tudway, against Mr. J. O. Jones, W. H. Trinder and G. L. P. Eyre (all parties being solicitors), setting forth that the plaintiff in Sept. 1837, began to carry on business with the defendants Jones and Trinder, as solicitors, under the name of "Jones, Trinder and Tudway," and so continued until 1845, when the defendant Eyre became a partner, taking one moiety of the share of the defendant Jones, and thenceforth the name carried on business together as "Jones, Trinder and Co.," without written articles. The bill then went on to say, that in 1848 the parties agreed to dissolve the partnership, and that there were unsettled accounts between the parties; and (after several allegations of improper and oppressive conduct on the part of the defendants towards the plaintiff) it was prayed that an account might be taken of all dealings and transactions of the partnership; that the defendants might be directed to pay to the plaintiff his share of the partnership assets, and that all proper inquiries might be directed and accounts taken. To this bill the three defendants put in a plea, averring that the plaintiff, in 1850, was a prisoner in the Queen's Prison, at a suit of two persons named Martin; that he petitioned the Court for Relief of Insolvent Debtors, under the provisions of the statute 1 & 2 Vict. c. 110, for his discharge; and being duly signed and filed, an order was made dated 22nd October, 1850; all the real and personal estate and effects of the plaintiff (excepting wearing apparel, &c., valued 20*l.*), and all the future real and personal estate, &c. &c., of the

TUDWAY

v.  
JOHNS.

1865.

*Practice—Plea*  
—*Insolvency*  
—1 of 2 Vols.  
a. 110.

plaintiff were vested in Mr. Samuel Sturges, the provisional assignee of that court, in trust for the use and benefit of the creditors; and that thereupon the plaintiff was, with the consent of the creditors, discharged from custody; that the petition of the plaintiff had never been dismissed, and no order had ever been made for revesting the estate and effects of the plaintiff; and therefore all right and interest of the plaintiff to and in the partnership estate and effects and other the matters in the bill mentioned were, at the time of the filing thereof, and were then vested in the provisional assignee for the benefit of the creditors, and the same were thereby submitted to the court by way of plea to the bill.

*Daniel and Bevir*, in support of the plea, argued that it was plain the plaintiff had no interest whatever in the property which he laid claim. The words of the Act of Parliament were explicit; and, as there had been no order revesting the estate and effects in the plaintiff, he was not entitled to sue; neither was there any order to dismiss the petition. The point had been expressly decided in the case of *Kernot v. Pittis*, in the Exchequer Chamber, in May 1863, and reported 21 L. T. Rep. 263; and they submitted that the plea must be allowed, and the more especially as the plaintiff had himself set it down for argument, course showing that he fully and freely admitted the averment contained in it. The cases of *Grange v. Trickett*, 21 L. J. Q. B.; *Kernot v. Pittis*, ib. 413; and *Re Mander*, 18 L. T. Rep. 211, were cited. (*Ante*, vol. 2, p. 24.)

*Rolt and Hoare* for the plaintiff.—The consent of the creditors to the plaintiff's discharge was sufficient to show that the property was no longer vested in the assignee. The plea raised no averment of any other debts than those of the Messrs. Martin, and therefore it must be assumed that they were the only creditors, so that it was plain that as they were satisfied no other parties could claim any interest but the plaintiff in the subject-matter of the suit. The court would remark that no proceedings under the insolvency had taken place for five years, which would of itself be sufficient to show that no party claimed an interest in behalf of creditors for whose benefit alone the estate and effects had been vested in the provisional assignee. As the Act of Parliament did not contain any sections for the purpose of revesting estates, it was to be assumed that the Legislature intended that when the purposes for which an assignment had been answered, the property assigned, not required for the purpose of the trust, should *ipso facto* revert in the insolvent. Even supposing the court not to take this view, it must be admitted that all the equitable right was in the plaintiff, the official assignee being a bare trustee for his benefit, and therefore the bill was sustainable. *Simons v. Ashman*, 2 Sim. 241, was cited.

*Daniel* was not called upon to reply.

The VICE-CHANCELLOR.—I think this plea must be allowed. The settled course of authority shows that in a case of insolvency,

re there has been an order vesting all the property of the  
 vent in the assignee, he, as plaintiff, has no longer any interest  
 which he can sue. It is not necessary for the purpose of that  
 to aver or say that the creditors are the only persons who are  
 rested, or, in other words, to say that there are not other  
 itors, nor to show that there is an order vesting the property  
 ay one else, or for some other purpose than for the benefit of  
 creditors; for, unless some other thing be disclosed in the  
 , it must be taken as true. The real question is, whether, it  
 g disclosed in the plea that after making the vesting order the  
 itiff was discharged out of custody by consent of the detain-  
 creditors without any adjudication and without its being stated  
 the petition was dismissed and the order for vesting being  
 arged, I am to hold that the estate has been divested by that  
 arge of the insolvent, or that the estate is to be considered as  
 d in the assignee, merely as his trustee. As to the first point,  
 her the estate remains vested in the assignee, the Court of  
 nequer Chamber, after argument, has decided that it so  
 ins vested. From my great respect for the judges who  
 led that case, no less than from the weight of the authority  
 ie case itself, it seems to me I ought not to depart from that  
 ion. I must hold that this property is vested in the assignee  
 r the Insolvent Act. The only question is, whether the  
 nee is a mere bare trustee for the plaintiff, or whether there  
 ything in the nature of the property, or the circumstances  
 ected with it, as shown on the pleadings, from which I can  
 that a trust arises on behalf of the plaintiff, or whether the  
 tiff had any interest whatever which could enable him to  
 in a bill in this court. Looking to the statute, and the  
 ion in the Exchequer Chamber, it is clear that the plaintiff's  
 erty remains vested in the assignee. It is impossible for me  
 y, in the face of the statute, that there is anything which is  
 vested in the assignee for those who may come in and show  
 selves entitled to a dividend. The Act of Parliament directs  
 immediate realization of the insolvent's property. There is  
 ing to prevent the assignees from filing their bill to realize the  
 of what is in their hands, and their creditors might come in  
 establish their claim to some dividend, although there had  
 no adjudication whatever. His Honour said, the 92nd  
 n of the Act was singularly framed, and he proceeded to  
 ve on the language of that section and of the 44th section.  
 llowed the plea, giving leave to amend within a month.

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v.

JONES.

1855.

*Practice—Ple*  
*—Insolvency*  
*—1 & 2 Vict*  
*c. 110.*

COURT OF QUEEN'S BENCH

June 21, 1855.

RYAN v. JENKINSON.

*Schoolmaster—Charity—Notice of dissolution*

*Certain property was devised upon trust, that trustees of the parishioners, should provide a schoolmaster and free scholars. The charity fell into Chancery, and the free scholars was for a time interrupted, and the school-house dilapidated and there were no funds for its repair. In the parish for building a new school-house by a trustee, when built, was conveyed to the trustees. One of the bye-laws of the trustees was, that trustees present at any meeting shall, by their vote then present, as well as the absent trustees.*

*The plaintiff succeeded to the office of schoolmaster by appointment at a vestry meeting of the parishioners, on the recommendation of the trustees, on the terms of the following resolution to which the meeting was no party:—That the trustees give to the master, out of the funds at their disposal, this sum to include payment for the service of a schoolmaster and girls sewing every afternoon except Saturday, and specified expenses) or 55l. if the trustees are to find a schoolmaster, appointment to be for a year, commencing March 1st, liable to be terminated by either party giving three months' notice. After the approval of the meeting, notice was given to the trustees to the plaintiff of his appointment. The trustees altered the terms of the resolution. Down to the*

*continued to discharge the office until and after March 25, 1855, and then sued for the three quarters' salary from June 24, 1854:*

*1, upon the above facts, that the trustees were to be considered the appointing parties, and not the parishioners, and therefore that the notice of dismissal by the majority of trustees was binding.*

*2, also, that the three months' notice need not expire at the end of a current year.*

RYAN  
v.  
JENKINSON.  
1855.

Schoolmaster—  
Charity—  
Notice of  
dismissal.

HIS was an action to recover the sum of 41l. 5s. for three quarters' salary, claimed as due on the 29th September, 4, the 25th December, 1854, and 25th March, 1855, to the plaintiff as schoolmaster of the endowed school at the parish of Whittington, in Derbyshire, from the defendant, who was one of trustees of the said school.

The facts of the case are as follows:—In July, 1674, one Peter Webster, by his will of that date, directed his executors to lay out certain moneys in the purchase of lands, and to cause the same to be conveyed to certain parishioners of Whittington aforesaid, upon trusts that the trustees, their heirs and assigns, should for ever hereafter, by and with the consent of others the parishioners of the said parish, provide and keep an honest and able schoolmaster in the said parish of Whittington, that should teach and instruct twenty of the meanest and poorest men's sons that should or were born in said parish, both in the English and Latin tongues, and also to write and cast accounts, and if at any time there be a schoolmaster which was an idle liver or negligent, was abusive to his scholars, if any of those things should be made appear to the said trustees and others the parishioners of the said parish, then the said trustees and others the parishioners should have power to dismiss him of his said place, and to choose and entertain another in his stead; and the testator provided by his said will that in case the said trustees, their heirs or assigns, should fail or neglect by the space of two years next after they should have enjoyed the moneys or lands before mentioned to provide and procure such an able and honest schoolmaster for the purpose before expressed, or if the said trustees, their heirs or assigns, after the place aforesaid should be supplied and become negligent, should wilfully neglect and suffer the said place to be vacant for six months together, that then in either of the said cases the said gifts, devises, and bequests for the use and benefit of the parish of Whittington and the inhabitants thereof should be void.

The said Peter Webster died in 1678, and in pursuance of his will certain lands were purchased, which were conveyed to and held in the trustees pursuant to his said will. In 1696 Joshua Webster (the son of Peter) by his will devised to the trustees nominated in his father's will certain other hereditaments for the educating in learning of ten poor children of the parish of Whittington aforesaid, at the school there lately endowed by his father, and above the number mentioned in his father's will. These hereditaments, together with the lands acquired under

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the will of Peter Webster, have been since and now are held by trustees, renewed from time to time according to the direction of Peter Webster's will. Before and in the year 1847 the charity had fallen into Chancery, and the schoolmaster had not received from the trustees the rents of the charity-estates, and the education of the free scholars was for some time interrupted for want of funds. The school-house in which the scholars had been taught (which was called the parish school, and which was erected on any of the charity lands) was in dilapidation and decay, and there were not any funds for its repair, and at a meeting of the parishioners, held on the 8th July, 1847, the following resolutions were passed:—"First, that the parties who are acting as trustees be requested to take steps for bringing the Chancery suit to a termination, and that all expenses legally incurred by the parties be defrayed out of the funds of the charity. That it is of the very highest and of the most urgent importance that a school should be forthwith established within the parish for the education of the children of the poorer classes, and that it is an imperative duty of the parishioners to build a new school-room, and that a subscription be forthwith entered into to raise a fund for the building a new school-room, to be handed over, when erected to the trustees appointed by the Court of Chancery for the benefit of the school estate. That the chairman be requested to communicate with the Committee of Council on Education to solicit their aid towards the building fund." Mr. F. Swanwick, one of the parishioners, agreed to give a site for the purpose of building a new school-house, and the land so proposed to be given was approved by the parishioners. At a vestry meeting, held on the 16th September, 1847, the following entry was made in the parish vestry books:—"The chairman having communicated to the meeting the tenor of the correspondence which had taken place between himself and the Committee of Council on Education, and having read to the meeting some of the letters which he had received from the secretary of the department, in one of which it is stated that their Lordships would be unwilling to make any grant to a school for objects so limited as those of this charity, and in another of which letters it is stated that, under certain conditions, their Lordships would probably make their usual grant, varying from 10s. to 15s. for every six square feet of acre provided in the school-room; it was resolved, that in consequence of the determination of the Committee of Council on Education not to contribute towards the erection of a school under the arrangements proposed by the resolution of the meeting of the 3rd July last, so much of the said resolution as prescribes that the new school-room, when erected, shall be handed over to the trustees appointed by the Court of Chancery for the benefit of the school-estate be, and is hereby rescinded." On the 6th April, 1848, at a vestry meeting of the parishioners duly called and held, it was resolved, "that Mr. Swanwick convey the site of the new school-house either to the minister, churchwardens and overseers of the poor, or to the new



tees of this charity, as the parishioners in vestry may think it desirable, and the Committee of Council on Education may sanction, and that thereupon the rents of the school-estates be appropriated to the future maintenance of the new school, and towards payment of the salary of the schoolmaster thereof, under the sanction of the newly appointed trustees, meaning thereby eight persons (including the defendant), who were duly nominated and appointed the trustees of the charities and charitable estates of the parish of St. Peter and Joshua Webster. At another vestry meeting of the parishioners, duly called, and held on the 21st September, 1851, the following resolutions were passed: "That the resolutions and proceedings of the meeting of parishioners, held on the 21st April last, relating to the school and school-estates of this parish, be, and the same are now, confirmed by this meeting. That the deed of appointment of new trustees shall have been executed and completed, Mr. Swanwick be, and he is hereby, requested to grant to the new trustees, or to the minister, churchwardens and overseers of the parish (as the trustees may direct) the site of the new school-house, to the intent that the new school and school-house may, in future, be supported out of the charitable estates so vested in the said trustees, under the wills of Peter Webster and Joshua Webster deceased." At a trustees' meeting (at which five out of the eight trustees appointed as aforesaid were present), held on the 6th October, 1848, bye-laws were passed agreed to for the regulation of the meetings of the trustees, amongst them the following:—"Thirdly, that the majority of trustees present at any meeting shall, by their vote, bind the majority then present as well as the absent trustees." On the 11th November, 1848, by indenture of that date, the said Frederick Swanwick conveyed the land which had been agreed on as the site of the intended new school as therein mentioned. A new school-house has been erected by private subscription, with the sanction of a grant from the Committee of the Privy Council on Education, on the site conveyed as aforesaid to the trustees by indenture of the 6th November, 1848. On the 10th May, 1851, at a vestry meeting of the parishioners of Whittington, it was resolved that a new school-room be now erected, the old building being in a most dilapidated condition, and the materials of which it was built being exposed to depreciation and decay, it is expedient that the materials of the old school building should be forthwith sold by auction. This was accordingly done, the amount produced, being 97*l.*, was carried to the credit of the building fund of the new school. The only fund the trustees possess, or have ever possessed, for the maintenance of the new school when built, or payment of the schoolmaster's salary, is the moiety of the estate held by them under the wills of Peter Webster and Joshua Webster as aforesaid. The first master appointed for the erection of the new school-house, having given notice of his intention, resigned his office on the 25th March, 1851, and the plaintiff was appointed his successor in manner and under the

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school at Whittington, near Chesterfield, are applications for the office of master, which will be the 25th March next. Candidates must be instructed to pupil teachers, and to pass the examinations. The emoluments of the office will amount to £80. Applications, accompanied by testimonials, to be transmitted to Mr. John Clark, the honorary secretary, near Chesterfield, on or before the 18th March. Various applications which had been received at the meeting, and the consideration of them was a matter for the meeting of the trustees to be held on the 25th March. Notice was ordered to be given on Sunday the 27th of parishioners to be held on the 27th February for the purpose of choosing a master to fill the vacancy which will occur on the 25th March then next. On the 18th March, at another meeting of the trustees, it was resolved that the trustees will give to the master, out of the funds of the school, £60 per annum, this sum to include the service of a sempstress to teach the girls sewing except Saturday, and to include the expenses of the room, pencils, pens, and ink, or £55 if the master is a mistress. He shall teach thirty children for the remainder he shall be allowed to charge for the remainder to be agreed upon with the trustees, from twopence to sixpence per week, subject to the approval of the trustees, from time to time, this appointment to be for one year, commencing on the 25th March, and to be liable to be terminated by either party on three months' notice." The foregoing resolution was carried, and the plaintiff, who was present, and it was further resolved that the plaintiff should be recommended by the trustees

in, 1851, the plaintiff came to Whittington and entered upon duties of schoolmaster. On the 16th April, 1851, at a meeting of the trustees, the plaintiff was informed that he was required to read the Bible daily to the scholars, but not to teach the Church catechism, or any other religious formulary, and a letter was ordered by the trustees present to be written to the plaintiff, informing him officially of his appointment; and, accordingly, on 17th April the honorary secretary of the trustees wrote to the plaintiff the following letter:—

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“Whittington, April 17, 1851.

Dear Sir,—I am instructed by the trustees of the Whittington parish school to inform you by letter of your appointment as master of the school, subject to the following terms:—That the trustees shall pay you at the rate of 55*l.* per annum and no more, unless as by mutual consent you shall retain the office of master of the education, free of charge, of thirty children in accordance with the wills of Peter Webster and Joshua Webster; the appointment to be subject to termination by three months' notice by either party; that, for giving instruction to other children, you shall be at liberty to charge according to the following scale, the rate in each particular case, and the general scale, being nevertheless at all times subject to approval and modification by the trustees): for young children learning reading and writing, at the rate of twopence per week; for children receiving instruction also in arithmetic and in the other branches of education taught in the school, at the rate of fourpence to sixpence per week; it being understood that in case of girls paying fourpence upwards, and learning to sew, one penny per week is to be deducted for the payment of the sewing mistress.

“I am dear Sir, yours truly,

“JOHN CLARK, Hon. Secy.”

In this letter the plaintiff wrote the following in answer:—

Sir,—I am in receipt of your letter touching my appointment, which I beg to thank you. I hardly need repeat that I fully understand the conditions on which I hold the office of schoolmaster of Whittington school.

“I am, Sir, yours respectfully,

To Mr. Clark, Hon. Secy.

“JOHN RYAN.”

From the 25th March, 1851, down to the latter part of 1853, the plaintiff conducted the school with success, and to the satisfaction of the trustees. The salary from the trustees (which he received in addition to the emoluments arising from the school) was paid to him quarterly, on the 24th June, the 29th September, the 5th December, and the 25th March in each year. In the latter part of the year 1853 and the beginning of 1854, disputes arose

meeting assembled this 1st day of March, 1854, for your having declined to attend to our wishes teachers' indentures of apprenticeship, or to England Catechism in the school under our rule do hereby give you notice to quit and deliver and office of schoolmaster of the said school calendar months from Saturday the 25th witness our hands this 1st day of March, 1854

|                  |          |
|------------------|----------|
| "ROBT. ROBINSON, | SAML. J. |
| "HENRY DIXON,    | JOHN L.  |
| "GEO. JENKINSON, | GEO. TH. |

A minority, consisting of two of the trustees, received this notice, and refused to sign it, and objected to be acted upon; and the notice was also given to the trustees, and their consent or subsequent ratification by the trustees to the contrary, as soon as the fact of the notice was made known to the parishioners, a meeting of the parishioners, a meeting of the parishioners, and on the 9th March, 1854, such meeting of the parishioners assembled at such meeting upon the subject of the notice, and resolved "that the plaintiff (in the words of Peter V. of the school) was an honest and able schoolmaster, and should not be deprived of or relinquish his office;" and the trustees having advertised for applications to supply the expected vacancy to arise from the death of the plaintiff, the parishioners again met on the 10th March, in vestry, and expressed their dissent from the notice given by the trustees to the plaintiff, and directed that the following resolution be inserted in the newspapers, declaring that the school should not be vacant, and asserted their right to be consulted in the appointment of the schoolmaster, and to have their concurrence obtained before the appointment of the schoolmaster.

ees, to recover three-quarters of a year's salary from the June, 1854, to the 25th March, 1855. At the hearing in County Court it was contended, on the part of the plaintiff, under the circumstances above set forth, the consent and concurrence of the parishioners were essential to his dismissal as to his appointment, and that the notice of the 1st March, 1855, was insufficient.

On the part of the defendant it was contended that the plaintiff held his office under the deed of 6th November, 1848, and the 4 & 5 Vict. c. 38, s. 17, which provides, "that no schoolmaster or schoolmistress to be appointed to any school erected on land conveyed under the powers of this Act shall be deemed to have acquired any interest for life by virtue of such appointment, but shall, in default of any specific engagement, hold his office at the discretion of the trustees of the said school;" that there was a specific engagement between the trustees and the plaintiff (as contained in the letter of Mr. Clark, the secretary, to the plaintiff, of the 17th April, 1851); that the appointment should be subject to termination at three months' notice by either party (meaning the trustees on the one hand and the plaintiff on the other); and that the appointment was determined by the notice here set forth on the 24th June, 1854. The judge held that the deed was good and effectual to dismiss the plaintiff, and that the plaintiff could claim no salary after the expiration of such notice, and he gave judgment for the defendant. The question for the consideration of the court is, whether such judgment was correct, or whether the plaintiff was entitled to recover in the action.

The habendum of the deed of the 6th November, 1848, above referred to is as follows:—"To have and to hold the said piece or parcel of land and hereditaments hereby conveyed unto and to the said George Gordon, John Hollingworth, Lyon Booth, John Dey, and Samuel Bower, as such minister, churchwardens, overseers of the poor as aforesaid, and their successors, the minister, churchwardens, and overseers of the poor for the time being of the said parish of Whittington for ever for the purposes of the said Act: and in trust to permit a school-room or rooms, and use or houses for the master and mistress of such school, to be erected, built, and maintained upon the said land hereby conveyed, to permit such school, school-houses, lands, and hereditaments to be henceforth appropriated and used as and for a school for the education of the children and adults, or children only, of the several classes in the said parish of Whittington for ever, and as a residence for the master and mistress of such school, and for no other use or purpose whatsoever; the master or mistress of the said school to be from time to time appointed by the persons acting as trustees for the time being of the said charities and charitable societies of the said Peter Webster and Joshua Webster, by and with the consent and approval of the parishioners of the said parish of Whittington in vestry assembled; and the said school to be under the general management and control of the persons so acting as

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tion of such Sunday school and place of wor-  
be left to the free choice of such parent or  
scholars thereby incurring any loss of the be-  
the school, the trusts whereof are hereby decl

*Bramwell* (*Hayes* with him) for the app-  
has discharged his duty according to the ter-  
The sole ground of his dismissal was, that he  
Church Catechism in the school; but if  
would have been acting in violation of the  
The annexation of the new school-house to  
affect the rights of the parishioners under  
trustees and parishioners jointly appointed  
notice to quit should have been by them  
trustees only were the appointing parties, the  
been stated to have been given in the name o  
act of the whole body, and not in the name  
Again, the appointment was from year to  
should have expired at the end of a current y

*H. Hill* for the respondents.—The contra-  
contained in the letter from the trustees to t-  
ing his appointment, and the will of Webster  
into it. The trustees were the appointing  
notice, how could the plaintiff give notice  
The ground of dismissal was misconduct.

COLERIDGE, J.—I am of opinion that the d-  
Court judge was right, and that judgment o-  
the respondent. The material question to  
facts is, who was to be considered the app-  
sense in which the word "party" was made  
tion and letter? The parties were the trust-

re was no reference to the parishioners. The parties were the trustees and the schoolmaster, and notice to determine the master after or before the first year might be given on the one hand to the trustees, and on the other by the schoolmaster. Convenience is in favour of this construction. If the notice must be given by the trustees and the parishioners, such a state of things would be impossible in practice, and at all events inconvenient. It is not necessary to conclude that the schoolmaster was appointed by the resolution. I should rather think he was appointed by parol; a resolution being passed that he should read the Bible and teach the catechism, a letter was written to him to which he subscribed, saying, "I need hardly say that I fully understand the duties on which I hold the office." It was open to the court to see what the letter contained, viz. [Read letter from trustees appointing them plaintiff of his appointment subject to the terms of salary paid at the rate of 55*l.* per annum, and no more, so long as he should continue master, &c.] The consent referred to in that letter is that of the trustees and the master. I think, therefore, the trustees were the parties who ought to give the notice. The question is, whether the trustees have given the notice which the master had a right to do. It is not like the case of tenancy of land; notice as this might be inconvenient in such case, for sometimes the tenants are not paying quarters, and it would be inconvenient to the tenant, in case of an agricultural tenancy, to be turned out of any particular quarter. But in the case of a master of a school, it is important that he should not be allowed to stay a whole year after he has committed some disobedience, though that might justify immediate expulsion; he ought not to be allowed to stay those who have appointed him—to carry on the education of the scholars in opposition to those whose duty it is to appoint other persons to teach. In this case the schoolmaster does not stand in the same situation as under the Webster foundation, in which nothing was said in the letter or resolution. The thing had been changed. The original charity had joined in to something else under the authority of the Committee of Council. Notice having been given, an action for salary after the time specified in the notice is not maintainable.

RIGHTMAN, J.—This action is on a contract in writing in 1851, with the defendant and the other trustees; the contract is in terms with the trustees, and it does not refer to Webster's

Under that, however, the parishioners had only an assenting vote. Then, under the contract, the plaintiff was appointed master on the terms stated. It seems to me that "mutual consent," in the contract, means consent of the parties to the contract. A majority of the trustees had given a notice to quit, but they said that the notice should have been given by the trustees and the parishioners. The contract does not say anything of the

The resolution is for a year, commencing March 25, and is liable to be terminated by either party giving three months' notice; but the contract is, "The trustees shall pay you at the

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VICE-CHANCELLOR KINDERSLEY

July 25, 1855.

BENNETT v. POWELL.

*Judgment—County Court—Equital*

*The Court of Chancery will aid a creditor who has  
in a County Court in realising his debts out of  
his debtor.*

THIS was a bill filed by a creditor who had  
in the Shoreditch County Court of M  
defendant Thomas Powell. The bill, after st  
the debt arose, stated that Howell Powell,  
5th December, 1839, gave and bequeathed to  
William Smith and James Nichols, their exec  
and assigns, four leasehold houses in New  
Old-town; three houses in Eden-place, Hox  
houses in Ebenezer-buildings, Ivy-lane, Hox  
Luke-street, Paul-street, in the parish of Sho  
in Clerkenwell-close in the parish of St. J



dings, if the same should be sufficient for such purposes, to unto his son the defendant Thomas Powell, during his natural one annuity or yearly sum of 35*l.* to be paid quarterly on the 1 quarter-days; and out of the clear net rents and profits of said six houses in Luke-street, to pay unto his said son during life another annuity or yearly sum of 10*l.* to be paid quarterly aforesaid; and as to the said two houses in Clerkenwell, after decease of the testator's wife, out of the clear net rent and profits of the said two last-mentioned houses, to pay unto his said son during his natural life the further annual sum of 25*l.* to be paid quarterly as aforesaid; and the testator appointed the defendants Smith and J. Nichols executors of his will. The testator died the month of February, 1840, without having altered his will, the defendants Smith and Nichols proved the same, and have at that time received the rents and profits of the said houses. The testator's widow died several years since, and on the 17th day, 1852, the plaintiff J. Bennett brought an action against the defendant Thomas Powell in the Shoreditch County Court of Middlesex, for the sum of 48*l.* 14*s.* 2*d.*, and proceeded to trial of the action, and obtained judgment thereon for the said sum, together with 7*l.* 16*s.* 2*d.* for costs to be paid by instalments. Powell having failed to pay the first instalment, on or about the 6th July, 1855, a warrant of execution was issued out of the said court to the high bailiff thereof empowering him to levy on the goods and chattels of the defendant Powell the sum of 57*l.* 13*s.* 8*d.*, being the amount of such debt and costs. The bill also contained an allegation that the defendant Thomas Powell had not any goods or chattels which could be taken in execution under the said warrant, but that he was in receipt of the several annuities under the trusts of his father's will; that the whole of the said debt was still due and owing, and that the plaintiff was without remedy in the law unless by the assistance of a court of equity; and prayed that it might be declared that the said amount was a charge upon the said annuities, and that an account might be taken of what was due to the plaintiff, and that the same might be raised by sale or mortgage of the said annuities, and that in the meantime the defendants Smith and Nichols might be decreed to pay the several annuities, or such part of them respectively as might be due to the plaintiff, on account of the said sum of 48*l.* 14*s.* 2*d.* and interest.

*Bill and D. Bruce* in support of the bill.—This court would give judgment-creditor to realize his security against the equitable assets of his debtor. If the judgment in this case were a judgment of one of the Superior Courts, there would be no question as to the plaintiff's right to the relief he prayed (1 & 2 Vict. c. 13); and a judgment of the County Court put the party in the same position. By the County Courts Act, 1848 (10 Vict. c. 95, s. 96, "every bailiff or officer executing any writ or process of execution issuing out of the said County Court against the goods and chattels of any person may, by virtue thereof, seize

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assets.

not seize them, the plaintiff asked the aid of his rights; and this case came within the duty of equity as laid down by Mr. Justice Story in *Jurisprudence*, vol. 2, par. 1216; and also as Redesdale's book on Pleading, 5th ed. 148. were also cited:—*Neate v. Marlborough*, 3 My. v. Draper, 1 Vern. 399; *York v. Twine*, 3 Cr.

*W. Morris*, for the defendant Powell, contented that the County Court could only be put in the direction of the judge of the County Court. He decided that an action upon a judgment of a County Court could not be maintained: (*Berkeley v. Elder*, 281, Q. B.; S. C. 17 Jur. 1153; *Austin v. A*). Besides which the 16th section of the Statute provided that no writ of *fiery facias*, or other writ of execution, should be delivered to the sheriff, under-sheriff, or other officer, to execute the same, until the writ should be delivered to the sheriff, under-sheriff, or other officer, to execute the same. Again, provision is made for removing into the County Court judgments of the inferior courts. And the plaintiff adopted that course, and, not having done so, was not bound: (Sugden on Ven. & Pur. 670.)

*G. Simpson* for the trustees.

*Bovill* in reply.

The VICE-CHANCELLOR.—There is no doubt on which courts of equity act in aid of judgments of law. The question here was, whether those principles were applicable to the present case; and I am of opinion that they are. If a court of law of competent jurisdiction has given judgment for payment of a sum of money, which could be enforced by writ of *fiery facias*, and that if

adant is entitled to three annuities payable out of leasehold  
erty vested in trustees. Had the defendant's interest in  
annuities been a legal one, the amount might have been  
d out of them. What reason is there, then, that this court  
not apply the equitable doctrine in this case? The case  
*Trkeley v. Elderkin* is very different from the present one; that  
decided that an action in one of the Superior Courts could not  
maintained upon a judgment of the County Court; and, if I  
be permitted to use the expression, I entirely concur with  
Decision. The object of the action in the Superior Court was to  
n a judgment which could be executed in a manner different  
at in which County Court judgments are carried into effect.  
court leaves the judgment of the County Court just as it  
and merely makes the equitable interest of the debtor liable.  
as been contended that, inasmuch as under the Statute of  
ds a judgment would not affect leaseholds until a *fi. fa.* was  
d in the hands of the sheriff, and as this writ could never  
dged with the sheriff, leaseholds were not bound by it. The  
of the 9 & 10 Vict. c. 95, s. 96, directs that a warrant of  
tion shall issue to the high bailiff of the court, and it would  
very narrow construction to say, that because the officer of  
ourt was called high bailiff, and not sheriff, those leasehold  
els could not be bound; but, as the County Courts were not in  
ence at the time of the passing of the Statute of Frauds, that  
was not applicable to the present case. I am of opinion,  
fore, that the plaintiff is entitled to the relief he asks; but as  
ents appear sufficient, a sale or mortgage is unnecessary. I  
therefore declare that the trustees shall pay the sum due out  
e rents.

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—

*Judgment—  
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assets.*

MOSSOP v. THE GREAT NORTHERN RAIL

*Prohibition—County Court—Power of judge to  
9 & 10 Vict. c. 95, s. 89, and the 141st rule of  
Courts.*

*The judge of a County Court having refused upon  
to grant a new trial, cannot grant one at the next  
The plaintiff, in prohibition, brought an action  
against the defendants, and obtained a verdict.  
trial the defendants applied to the judge for a new  
tion was opposed by the plaintiff, and the judge  
At the next court, the application being renewed  
intimation from the judge himself, the judge  
Held, that the judge having once determined the  
grant a new trial, that judgment was final.*

**T**HIS was a demurrer to a declaration in  
original action was tried in the County  
was found for the plaintiff, damages 8*l.* 4*s.*  
then made by the defendant's advocate for a  
opposed by the advocate for the plaintiff and r  
and the judgment was entered and the dam  
The judge afterwards at another place told t  
defendant that he had reconsidered the matter  
with the verdict and his own refusal of a new  
would apply again for a new trial at the next  
where the trial took place, he would grant  
was accordingly made, and a new trial was g  
then a declaration in prohibition, and issue tak  
judge refused a new trial on the first occasi  
that the judge had decided to refuse it.

*House is against of the demurrer. The*

, says: "An application for a new trial may be made and mined on the day of hearing, if both parties are present, or be made at the first court held next after the expiration of the clear days from such day of hearing." That rule, being a directory rule of practice, does not interfere with the action of the judge, as has been held in the case of *Carter v. B.*, 24 L. J. 141, Q. B. It was there decided that, notwithstanding the omission to give seven days' clear notice of the application for a new trial, as required by that rule, the judge had a discretionary power to grant a new trial. This is like a court dispensing with the rule that a motion for a new trial be made within four days. Can a judge alter his mind at the same court? If he can, can he not do so afterwards? Is it said that he is to be taken to be infallible? He is under difficulties, both from the press of business, and the absence of counsel, to call his attention to the authorities, and it is reasonable that he should be allowed to say he was mistaken: (*Jones v. Jones*, 11 L. J. 698, was also cited.)

*Per* Serjt. contra.—A statutory power is required to enable a judge to grant a new trial. Here, the application having been once refused, it was *res judicata*. The same party cannot apply a second time upon the same grounds. The statutory power is gone, and the judge was *functus officio*. I may ask, can a judge alter his judgment after ten years? Can his successor alter it? Could he again alter his mind back to his original judgment? *Per* *v. Smith* is quite a different case from this. The judge must be allowed a discretion in some particulars, but not an extensive discretion as this. Where the judge is to have power of altering his decision the power is expressly given, as in section 100. Is the judge bound to hear the application again? *Yes*, in reply.—The judge is clearly not bound to hear it over again. He might say, "I have decided, and I will not dispense with the ordinary rule of practice." He might dispense with it if he pleased.

*Revis*, C. J.—I confess I thought the court had determined the question when the case was first brought to the notice of the court. My brothers Maule and Cresswell were of opinion that, being a statutable power, the judge, having refused the application of the first court, was *functus officio*. I am of that opinion. In some cases there may be a new trial. Well, an application is made for a new trial. It is refused, and the damages and costs are paid. The thing is at an end: it is out of court and over. I apprehend the jurisdiction of the judge is exhausted, and he has no right to revise his judgment, and the present plaintiff is bound to prohibit him.

*Williams*, J.—I have arrived at the same conclusion, notwithstanding the difficulty. The judge has power to grant a new trial after the first trial as before. The difficulty which occurred to me is, whether the exercise of that power is not a mere matter of course, and whether we ought not to assume that that would

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WILLES, J.—The object of having a court litigation should be determined, and that finally since a reason was given why judgments are final, and not opened up again, *ne lites sint in mortales*. A court of justice must be suited to persons concerned. Life is not long enough for matters that are already *res judicata*. Then, we gave this power to the judges of the County courts to have intended that those courts should decide accidents which belong to other courts. The object of those courts is to be final, except when a new trial is given. That power is to be exercised to recognised principles. The judgment, therefore, unless it comes within the power given; and, if a judge has determined that there shall not be a new trial, judgment must stand final.

*Judges*

## COURT OF QUEEN'S BENCH.

November 26, 1855.

RE CHIVERS ET UXOR v. SAVAGE.

*y Court—Jurisdiction—Prohibition—False imprisonment or malicious prosecution.*

*the hearing of a plaint in the County Court "for assaulting and imprisoning and detaining in custody the plaintiff without any reasonable or probable cause," there was some evidence that the defendant on a suspicion of felony had not only made a complaint and charge to the police, on which the police had themselves acted, but had also wrongly directed the police to take the plaintiff into custody :*

*that the judge had jurisdiction, though there might be other circumstances in the case which would properly be the subject of an action for malicious prosecution.*

*that under such circumstances prohibition would not lie, although the judge had in the course of his judgment used expressions which intimated that he was giving damages for a malicious prosecution as well as trespass.*

RULE had been obtained calling upon the defendant to show cause why the order of a judge directing a writ of prohibition to be issued to the judge of the County Court of Wilts, holden at Andford, to stay proceedings upon a certain plaint by Isaac Chivers and Maria his wife against Mary Owen Savage, should not be rescinded.

The particulars of the plaint were as follows:—"This plaint was entered to recover the sum of 50*l.*, which the plaintiffs claim of the defendant, for that you the said M. O. Savage did, on the 14th June last, assault and imprison and did detain in custody and Maria Chivers, without any reasonable or probable cause, whereby the plaintiffs have sustained damages to the amount of 50*l.*"

And the facts of the case appear from the following judgment, delivered by the judge of the County Court, after taking time to consider:

It was an action of trespass alleged to have been committed by a person of the female plaintiff by assault and false imprisonment.

The cause came on to be tried on the 23rd July last, the plaintiff appearing by counsel, and the defendant by attorney, who objected to the jurisdiction; but the objection then, having been confined only to the summons and particulars, was overruled, and

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the cause allowed to proceed. The material facts proved are as follows:—The female plaintiff is the wife of a sergeant-major serving abroad with his regiment, and during his absence she has taken to domestic service. On the 23rd May she left the family of a clergyman, and soon afterwards was sent for and hired a cook to the defendant, a lady residing in this town. On Thursday the 7th June she entered the defendant's service. The same day there was a dinner-party, and the plaintiff being in infirm health, and finding herself worse on the following day, she informed her mistress that she did not feel competent to the duties of the place, but offered to stay for her convenience till Monday, which offer was declined, and on Saturday the 9th, after breakfast, she left on foot for Hilperston, a person recommended by the other servants carrying her boxes. Appearing tired as she passed through Staverton, a Mr. Osborn asked her to come into her house and rest, which she did. It was then about ten minutes to twelve. Presently afterwards Thomas Hibbird, inspector of police, accompanied by a police officer and another man, entered the house and asked her if she had any spoons in her possession. She said she had not. He then said that her mistress, Miss Savage, charged her with stealing plate, and that she must go back to Bradford; she said she could not, that she was too unwell. He then inquired for her boxes, and she gave him the keys. The boxes were sent for, she being detained in custody. The boxes were brought, unlocked and searched, but nothing found in them belonging to the defendant. The inspector again said she must go with him to Bradford, but upon her objecting he took her in a gig to Broughton, and under his direction she was then searched by a female, but nothing found on her person. The inspector next conveyed her in custody to the house of the Rev. Mr. Wilkinson, a magistrate, who, upon hearing the inspector's report, ordered her to be discharged. She was thereupon taken back by the inspector in a gig to Mrs. Osborn's. It was then about six o'clock. About an hour after the policeman drove up to the house, accompanied by Sarah Mead the defendant's housemaid, and stated that the spoons had been found. The maid then said that her mistress had sent her to say that she was very sorry indeed for what had happened, that she wished her to be consoled, and would make her any compensation in her power. Sarah Mead, being called as a witness, proved that she had the care of the plate; that on Friday, the 6th June, her mistress dined in the breakfast-parlour; that there were six silver spoons; that she did not count them that evening; that the room was not cleaned next morning; that she missed three of the spoons and informed her mistress of it; that her mistress thereupon sent the man-servant for a policeman, who was directed to pursue after the plaintiff and take her. She proceeded to state that the same evening she herself went into the breakfast-room and saw the three spoons, and that she thought she had left them there, and that she was then sent by her mistress with a message to the plaintiff, which she delivered as already stated. It was further proved that the defendant after-



3, notwithstanding her message to the plaintiff, refused all action or apology, and asserted that although the spoons had been found, she believed that the plaintiff had placed them in the fast-parlour with intent to steal them. At this stage of the proceedings, it appearing that the defendant was then at a distance from home and unable to attend in person, and that there were important points to which only the parties could speak, it was thought that opportunity should be afforded her of giving evidence, and so disposed, of terminating the suit amicably; and with the consent of the parties the cause was adjourned to the 20th August. That day the defendant did not appear in person, nor had she anything to say to the proceedings. But the question of jurisdiction was again raised, it being contended that the cause of action, if it was a malicious prosecution, of which the County Court had cognizance. The authority mainly relied upon was *Jones v. Currey*, 20 L. J. (N.S.) 483, Q. B.; 1 County Court Cases, 559, decided by Wightman, J., upon a rule for a prohibition to the effect of the County Court of Surrey, holden at Southwark. And it may be admitted that the cases so far resemble each other in the respective facts, and that the language of the learned judge reported is such as to afford room for argument in support of the objection now made. It is of importance, however, that the definition of courts should be well defined and understood, in relation to which, in the present instance, it is necessary to ascertain, if possible, the legal signification and import of the term "malicious prosecution." For any formal definition of it I believe the books have been searched in vain; but it will hardly be contended that the word is used in our law in the lax and general sense in which it is applied to any ordinary object of pursuit, or that it has not, when technically employed, a limited and technical meaning. I think it is; and that, giving to the word the utmost latitude of meaning which the law admits of, it imports the use and putting in action against an individual party of some or one of the forms and instruments which the law provides for making wrong-doers amenable to its penalties. I believe no text-book or authority can be cited inconsistent with the proposition thus stated. Indictments, informations, warrants are the usual foundations of these actions, and the legal termination of the proceedings must be averred and proved. In *Phillips v. Eyre*, after stating the necessary proofs in terms which can be used only to formal proceedings, by indictment or otherwise, that the author adds, "the essential ground of this action is, that the prosecution was carried on without probable cause." In *Winter v. Royle*, 1 Camp. 187, which was an action of trespass for false imprisonment, the defendant falsely stated to the commander of a pressgang that the plaintiff was liable to be impressed; and it was held that the action in that form was maintainable, and, per *Ellenborough*, "that is not like a malicious prosecution, in which a person gets a valid warrant or writ, and gives it to another to be executed." In *Jones v. Currey*, it does not appear whether the wife was taken under a warrant, but the plaintiff alleges

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legal prosecution. Having disposed of the question, I can have no difficulty in deciding that the plaintiff is entitled to recover. In *Beckwith* 638, the law is thus laid down by Lord T. This distinction between a private individual and a constable, having reasonable ground to suspect a felony has actually been committed, is authorized to detain the person, and inquiry can be made by the proper authorities. In the case of the plaintiff, the court the plaintiff has been subjected to, and suffering upon an unfounded charge of felony, taken into custody, publicly conveyed by the constable from place to place as a prisoner, her boxes have been ransacked, her person searched, and she charged before a magistrate. Under these circumstances, she has endured much pain, both bodily and mental, and no felony was committed, nor was there, I am of opinion, any just ground for imputing it. Upon discovery, the defendant appears at first to have acted under a mistake, and would naturally lead to the expression of desire to make amends for the injury thus inflicted upon the person. I cannot but regret that the defendant, upon her first impression, has aggravated the injury by refusing compensation, or even apology, but although the spoons were found, it is her fault that they were placed in the breakfast-parlour by the plaintiff, and which looks to be a new form of accusation unsuited to the case, and which looks to be a charge upon the con-

sequently to the delivery of this judgment, application was *ex parte* to Mr. Justice Willes for a prohibition on the ground that this was a plaint for a malicious prosecution, and that before the judge had no jurisdiction to try it; and the learned judge made an order that the writ should issue; but the rule was mentioned to set aside that order had since been obtained.

November 23.

*Chambers and Morgan Lloyd* showed cause.—The jurisdiction of County Court depends upon the question whether this was essentially a plaint for malicious prosecution or for false imprisonment. The mere terms of the plaint are not very important. *v. Currey*, 20 L. J. 438, Q. B.; 1 County Courts Cas. 559); though here even the plaint itself, by the words “without reasonable or probable cause,” shows that the plaintiff was really coming of a malicious prosecution. But the facts and the judgment conclusively show what the case really was, namely, an action for malicious prosecution, and not for a false imprisonment. The defendant did no more than put the law in motion; she made an application upon which, in her absence, the plaintiff was apprehended; and she therefore committed no trespass: (*Barber v. Watson*, 1 Cr. & M. 330.) The judge also, throughout his judgment, really treats the case as one of malicious prosecution, though he enters into an argument for the purpose of showing that there could not be a malicious prosecution without a formal proceeding by warrant or information or indictment. The court will look at the substance of the whole transaction; and it is abundantly evident that the judge gives damages for the undoubted charge. That being so, prohibition ought to go. A judge cannot give himself jurisdiction over a matter which the law has excepted from his jurisdiction, by treating it colourably as another matter over which the law has given him jurisdiction. A County Court judge cannot try an action of slander, and give damages for the slander under the name of an assault, because the assault was accompanied by something which amounted to an assault in point of law. [ERLE, J.—Sometimes the blow and sometimes the word would be the more grievous offence. The plaintiff must choose for which he will proceed. COLERIDGE, J.—The plaintiff here charges a wrongful imprisonment by the defendant, and that is a matter over which the County Court has clearly jurisdiction. Now, suppose that the judge is wrongfully influenced in his judgment as to the amount of damages; is that erroneous jurisdiction, or is it excess of jurisdiction?] Excess of jurisdiction, if it gives damages in respect of a matter which does not properly come under his judicial cognizance. [COLERIDGE, J.—Yet he must hear the whole case.] Only for the purpose of ascertaining how far his jurisdiction extends.

*Smith and T. W. Saunders*, contra.—This is a plaint for assault and false imprisonment, and nothing more. [WIGHTMAN, J.—Then an action may still be brought in the Superior Court for malicious prosecution?] Certainly; but the plaintiffs would

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to give judgment for the plaintiff. (1700 110 418.) All the rest of the case is dealt with as mere aggravation; and even though the amount of damages, should have allowed by matters which he ought in strictness to have excluded from his consideration, that would clearly be a matter of prohibition.

LORD CAMPBELL, C.J., now delivered his judgment in the case. In the case we had before us on the application of *Savage*, respecting a prohibition to the County Court, on the ground that under colour of proceedings in trespass by false imprisonment, the complaint was, in fact, proceeding to try a case of murder which was not within the jurisdiction of the County Court. In opinion that the rule for rescinding the judgment was made absolute. The plaintiff, as appears by the facts, was a trespass by false imprisonment, a matter clearly within the jurisdiction of the court, and there was evidence that the defendant, upon a suspicion of felony, had on a complaint and charge to the police, on which the police had taken the plaintiff into custody, in which the plaintiff's false imprisonment would not have been maintained if the police had expressly directed the police to take the plaintiff into custody, which was an imprisonment by the police, in which the trespass would lie. Upon the plaintiff for the County Court judge had jurisdiction, though the circumstances in the case which would proper an action for malicious prosecution. The order of the judge having in the judgment used expressions giving damages for a malicious prosecution, as

## COURT OF QUEEN'S BENCH.

January 15, 1856.

ACKROYD v. GILL.

*County Court—Assistant-clerk—Penalty for practising.**Assistant-clerk of a County Court is an officer of such court within meaning of sect. 30 of the 9 & 10 Vict. c. 95.**He, therefore, such assistant-clerk was alleged to have acted as attorney in certain plaint in the said court:**that he rendered himself liable to be sued for the penalty of 50*l.* under the foregoing section for so acting.*

THIS was a rule calling upon the defendant to show cause why the nonsuit herein should not be set aside, and a new trial on the ground of misdirection.

The action was brought against the defendant, who was assistant to the County Court at Knaresborough, Yorkshire, to recover the penalty of 50*l.*, under sect. 30 of the 9 & 10 Vict. c. 95 (County Courts Act), for being concerned as attorney for a party in a plaint in that court.

The declaration stated that, after the making and passing of an Act made and passed in the session of Parliament, holden in the 10th and 11th years of the reign of our sovereign lady the Queen, entitled *An Act for the more easy Recovery of Small Debts and Damages in England*, the defendant, then being an officer of the County Court, holden at Knaresborough in the aforesaid county, as assistant-clerk of that court, was directly concerned as attorney for one Sarah Fothergill in a proceeding in the said court; to wit, in a plaint entered and action pending in the said court, wherein the said Sarah Fothergill was plaintiff, and one Robert Stables Ackroyd was defendant, contrary to the said statute, whereby the defendant forfeited for his said offence the sum of 50*l.* A second count was, for that being an officer of the said court, to wit, an assistant-clerk, he caused to be issued out of the County Court a summons to the said R. S. Ackroyd. The defendant pleaded not guilty.

At the trial at the last assizes for Yorkshire, the plaintiff, under the direction of the learned judge (Platt, B.), was nonsuited on the ground that an assistant-clerk did not come within the terms of the said statute.

Section 29 it is enacted, "that no clerk, treasurer, high bailiff

The 24th section, after providing for the a for every court by the judge of the court, as of the Lord Chancellor, enacts that, "in case such assistant clerks as may be necessary a paid by the clerk of the court."

*Addison* now showed cause, and contend clerks referred to in sect. 24, of whom the one, do not come within the description of "30, which must be taken to mean other office the parties named in the prior portion of the tation clause (sect. 142) giving no such exte word "clerk," and the assistant clerk being pointed by the clerk of the court to assist h being paid by him, being therefore no mc County Court than an attorney's clerk would court. [LORD CAMPBELL, C. J.—There is which says anything about the appointment Here an assistant clerk is appointed expressly of this statute.] It only empowers the clerk of appoint an assistant clerk if he thinks proper paid by him. [LORD CAMPBELL, C. J.—T the same objection to an assistant clerk acting case as a chief clerk.] The chief clerk is assistant clerk. This, being a highly penal clau strictly. Upon the same ground it might under-bailiffs appointed by the high bailiff officers of the court. The words in sect. 30 to apply to such other clerks as are express such as a deputy-clerk under sect. 26, or as provided for under sect. 25. The assistant east upon him by the statute: he is mer

act, he would not be affected by anything contained in the old act, and, moreover, the express mention in the second act of assistant clerks shows that the Legislature did not intend, in the act, to include them by implication.

*Hill, Q. C.* and *Hardy*, contra, were not called upon.

ORD CAMPBELL, C. J.—I should certainly have been disposed, but for the assistance of the subsequent statute, to have held that the defendant came within the operation of the first act as “an officer of such court.” He is of the same kind and character, and within the terms named. But all doubt is removed by the operation of the subsequent act. That statute is not an original act, but is to be construed with the former act. It makes no mention of office, but refers to the offices under the old statute. If the party is an assistant clerk, why then he is an officer of the court.

RIGHTMAN, J.—I am of the same opinion. Even under the first act alone I should have held the party to have been an officer of the court, for he is expressly referred to in sect. 27, which says, “that the clerk of each court, with such assistant clerks as the court may appoint, shall issue all summonses, warrants,” &c. It is difficult to see, therefore, that the court could not take cognizance of his being one of its officers. But all doubt is set at rest by the terms of the subsequent statute; there it is expressly shown that assistant clerks are officers of the court.

COMPTON, J.—I think the words “or other officer of any such court” are used for the purpose of including all those parties. Sect. 27 shows that they are officers, for it assigns them duties to perform. It is said that this action is not founded on the subsequent act, and, therefore, that it ought not to be considered; but this is incorrect. The second statute is used only to show what was the meaning of the Legislature. The second act expressly makes an assistant clerk as an officer of the court, and shows us before how we ought to construe the first statute.

*Rule absolute.*

DOLERIDGE, J., had left the court.)

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*Assistant-clerk  
—Penalty for  
practising.*

January 12, 1856.

BOURNE v. SOUTH EASTERN RAILW.

*County Court—Prohibition—Title to lan*

*In order to obtain a prohibition on the groun  
poreal or incorporeal hereditament comes in q  
party may apply at any time to the Superior  
facts upon affidavit, and is not bound to wait  
County Court, and raise the objection there in .  
The County Court has jurisdiction to entertai  
corporation.*

**W**ILDE, having obtained a rule *nisi*, to th  
Court of Kent for a prohibition on the g  
an incorporeal hereditament came in question  
plaint was entered in the County Court of Tu  
prising of the use of a cart-way leading from a  
to a certain public highway. The plaintiff stood f  
13, when an objection was taken by the c  
that the defendants being a corporation, th  
no jurisdiction in the matter. This objection  
the further hearing of the plaint adjourned;  
the title to an incorporeal hereditament cou  
not then urged. Afterwards, a summons fi  
taken out and the matter referred to the cour  
vits the defendants said that they did not adr  
claimed, and that it was in effect extingui  
conveyance to them in 1849 of certain land  
of the plaintiff's farm, for which he receive  
The plaintiff in his affidavit said that such  
interfere with the right of man claimed



defendants to have come and said, Our defence involves an entry into a title to an incorporeal hereditament; the judge would be bound to say whether that defence was *bonâ fide* raised or not; (*Lilley v. Harvey*, 5 D. & L. 648.) The matters relied on by the defendant do not interfere with the right of way created by the plaintiff. Secondly, as to the objection of the defendants being a corporation. [By the COURT.—We all agree there is nothing in that objection.]

MR. CAMPBELL, C. J.—As to the application being premature you can never apply too soon for a prohibition; you may apply too late. Here the particulars of the plaintiff show *primâ facie* an entry into an incorporeal hereditament, and the affidavits show the defence is upon the title.

MR. GHTMAN, J.—*Primâ facie* the title comes in question.

MR. COMPTON, J.—You may always go into the question of jurisdiction upon affidavit, and are not bound to wait until the trial in order to raise it; if it were not so, almost all the prohibitions that have been issued are wrong. Here the facts, which show that an entry into the title to an incorporeal hereditament comes in question, are brought before us in the first instance upon affidavit, and the other side do not show that it is not intended to raise this question *bonâ fide*.

*Rule absolute.*

BOURNE  
v.  
SOUTH  
EASTERN  
RAILWAY  
COMPANY.  
1856.

## COURT OF EXCHEQUER.

January 16, 1856.

OAKLEY v. THE PORTSMOUTH AND RYDE STEAM  
NAVIGATION COMPANY.

*Common carrier—Accident—Act of God.*

*To excuse a common carrier from liability for an accident on the ground that it arose from an act of God, the accident, whatever it may be, must be overwhelming and inevitable, and not such as might, with great foresight and with energy, care and skill, have been prevented.*

THIS was an appeal from the decision of the judge of the Hampshire County Court. The action was brought to recover 29*l.*, the value of goods and merchandise of the plaintiff, alleged to have been lost through the negligence of the defendants, to whom they had been entrusted to carry in that capacity as common carriers. It appeared that the defendants carry on their business by steamboat between Portsmouth and Ryde, and that they had entered into a contract with the plaintiff, who is a common carrier by land, for the conveyance of goods between those places, and that one of their barges had been set aside for the express purpose of conveying the goods of the said plaintiff across the Solent. In January, 1854, this barge, filled with goods belonging to the plaintiff, was being towed by a steamer belonging to the defendants, called the *Princess Royal*, from Portsmouth, the practice being to call at Gosport for passengers; and it so happened that on this occasion, the weather being boisterous at the time of her arrival at Gosport, the *Prince of Wales*, also belonging to the defendants, was leaving, and there being a considerable swell at the time, it became necessary to stop the *Princess Royal*, whereby the barge was driven against the stern of the *Princess Royal*, and was thereby damaged, and sprung a leak, and was obliged to run ashore, and part of her cargo was lost or damaged.

On this state of facts the judge of the County Court was of opinion that the defendants were guilty of negligence, and gave judgment against them accordingly, against which they now appealed.

*Hayes* for the appellants.—This is a special contract, and the parties are not in the position of common carriers. The accident

with, occurred by the act of God; that is to say, something overcomes the foresight of man, and renders the accident able: (*Forward v. Pittard*, 1 T. R. 27; *Amies v. Stevens*, 1. 128; *Trent Navigation v. Wood*, East, 25; Geo. 3, B. R.)  
 ERSON, B.—Here the stopping of the boat was surely the fault of man.] There was no negligence; the accident arose from natural causes. The case of *Amies v. Stevens* is not distinguishable from the present. Abbott on Shipping, 382; Story on Damages, 330, were also referred to.

*M. Cooke* contra.—There is nothing to prevent common carriers making special terms for the more convenient conduct of business, and it is found on the case that defendants carried common carriers, and their liability in that capacity is not denied. It is not necessary that there should be actual negligence on the part of the carrier; he is, in fact, an insurer: (*Richards v. London, Brighton and South Coast Railway Company*, 7 C. B. 158.) The question whether this was or was not the act of God was never brought before the County Court judge; but there was no pretence for that argument—the accident was, in fact, caused by the stopping of the *Princess Royal*. (He also referred to Abbott on Shipping, 383.)

PERSON, B.—I think we are all satisfied that this accident was not caused by the act of God.

PERSON, B.—Just so. An accident caused by the act of God is something overwhelming—not merely an accidental circumstance, such as appears to have happened in this case.

*Appeal dismissed.*

OAKLEY  
 v.  
 PORTSMOUTH  
 AND RYDE  
 STEAM  
 NAVIGATION  
 COMPANY.

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*Common carrier*  
 —Accident—  
 Act of God.

DENTON v. THE GREAT NORTHERN RAILWAY

*Time-tables—Liability of railways for false statements.—A railway time-table, issued with the authority of the railway company, that a train would leave P. for H. at 7 p.m.*

*H. was over the lines of three distinct railway companies, and the defendants' company had served the defendants' company with a notice that it would discontinue the 7 p.m. train to H. Notwithstanding the time-tables were issued and continued published without any alteration by the defendants' company, the train did not go to H. at 7 p.m.*

*Held, that they were responsible to parties who applied for such train to H. for damages sustained by the plaintiff, such train not going as advertised in the time-table. Both on the ground of contract and tort. Compensated on the ground of contract.*

THIS was an appeal from the decision of the Court of Queen's Bench, in the case of *Denton v. The Great Northern Railway*, decided in the Bloomsbury County Court, Middlesex, in 1855, under these circumstances:

The plaintiff was a civil engineer, and had been employed on the 25th March, 1855, and at Hull that day. Accordingly he went to Peterborough on the 25th March, 1855, intending to go on to Hull by the train published by the defendants, and he perceived that the Hull train was therein stated to leave Peterborough at 7 p.m. On the evening of the 25th of March he went to the Peterborough station, and applied for a ticket to Hull, and was then informed that the train did not go to Hull that night, and that there was no train by which he could get to Hull that night. The line from Peterborough to Hull was a line of three different companies.

they should cease running the train to Hull which theretofore Peterborough at 7 p.m. The defendants, however, had then prepared their March time-tables, with the time for such train at m., as it had been theretofore, and such time-tables were issued published without any alteration or notice of the discontinuance of the train in question. There was a notice on the time-tables that the company made every exertion that the trains should be actual, but that they did not hold themselves responsible for delay. It was found that the plaintiff had made arrangements on the faith of the train in question running as stated in the defendants' time-tables, and was misled thereby. The consequence was, the plaintiff could get no further than the Milford-junction on the night of the 25th of March, and when he arrived at Hull the next day he was too late and lost his appointment. The damage sustained by the plaintiff was 5*l.* 10*s.*

*Synard* for the plaintiff.—There was either a contract between the plaintiff and the defendants which was broken by the defendants, or there was a false representation by the defendants, consequential damage to the plaintiff for which the defendants are liable. First, as to the contract: the case of the publication of a time-table by a railway company is analogous to that of the publication of a reward for the apprehension of an offender; a contract is created with the individual who satisfies the condition: (*Williams v. Carwardine*, 4 B. & Ad. 621.) The condition of a time-table is that a party shall purchase a ticket for a certain place, and the promise by the railway company is that a train shall run for that place at the given time. A carrier of goods is liable to receive goods duly tendered, and the same rule should apply to carriers of passengers. Secondly, the defendants are liable for a tort. They make a false representation to the plaintiff's damage; and they knew that the representation was false.

And although a jury should say that they acquitted the defendants of fraud, it would still be a false representation for which the defendants are liable: (*Johnson v. The Midland Railway Company*, 4 Ex. 367; *Bennett v. The Peninsular Steamboat Company*, 6 C. B. 782.)

*Hill* (*Johnston* with him).—This is a most important case for railway companies. [LORD CAMPBELL, C. J.—Yes, we are now to determine what liability the companies incur by the publication of their time-tables.] Here no ticket was issued to the plaintiff for the train. [LORD CAMPBELL, C. J.—It is clear, and has often been decided, that when a ticket has been issued, it makes no difference whether the company is the owner of the whole of the line to be traversed or not; they thereby make an express contract, and are bound by it.] The time-table creates no contract with the public; it is only evidence of a contract. It bears no analogy to the case of handbills for rewards. There the party entitled to the reward performs work and contributes labour, for which an implied promise to remuneration arises. [LORD CAMPBELL, C. J.—Do railway companies invite custom by their time-tables? Is it

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table could only amount to an offer to contr  
defendants are not liable for the stoppage c  
North-Eastern Company. The North-Easter  
act that caused the damage. At the time tl  
printed they were true. Then the North-Ea  
continues the train. Then were the Great  
Company bound to publish new time-tables?

C. J.—Are they justified in continuing time  
know to be false?] Here it was only false as  
another company.

LORD CAMPBELL, C.J.—This case is of ve  
both to railway companies and to the public.  
railways would not be that benefit and accomm  
which they ought to be, if representations n  
tables are to be treated as so much waste p  
considered as the foundation for a contract. ]  
the plaintiff is entitled to recover, both on th  
was a contract, and also a false representatio  
that there was a binding contract, and to be ju  
company should publish in express terms th  
that customers would come to a particular sta  
hour, a train would be passing at that hour  
and that any person who paid his fare should  
that station to another station. Why would n  
contract; there is both a promise and a good c  
not the time-table amount to such a conti  
one who reads it understands that at the parti  
be a train passing from Peterborough to ]  
person who comes will be accommodated with  
fare. A passenger makes all his arrangement  
promise in the time-table being performed, ar  
result to any person who came, having made his  
view to it. and tendered his fare. The promis

re any reason for not performing it. It makes no difference whether the whole of the line is not the property of the defendants; enough that the time-table says that the train runs from Peterborough to Hull. It is allowed that if the company had issued a ticket from Peterborough to Hull, it would have made no difference that the whole line from Peterborough to Hull does not belong to the defendants. The defendants did not inform the plaintiff how much of the line belonged to them, and how much to the company, but they undertook that a train should go from Peterborough to Hull. It was stated in the argument that this would make the company liable, even although by some *vis major*, or accident, they should be prevented from completing their contract. Looking at the nature of the contract, there may be certain obligations which are implied. As in the case of a policy of marine insurance the perils of the sea are excepted, so in this case may be the perils of the land; as if a train, without any fault of the company, should be prevented from going, by an inundation or by a convulsion of nature. I cannot see any inconvenience as to arise from this principle being laid down. It has been stated that the decision here may be applied to the sailing of a ship. Now, suppose a ship advertised as lying in St. Katherine's Dock, and that it would carry goods to Calcutta at a certain rate, and within a certain time; and suppose that, relying on those representations, goods are sent, and the sender is then told that the parties have changed their minds, that they have got a better ship, and, instead of going to Calcutta, the ship is going to America; I think that in such a case an action could be maintained against the parties, who made such representations and entered into such an engagement, by a person who has acted on them and is prejudiced thereby. With respect to the other side, I think the case is still more clear. This time-table was issued and contained what the law calls a false and fraudulent representation; and would not an action lie for wilfully publishing it, even after notice had been given to the defendant, that the train would be discontinued? And after notice from the North-Eastern Railway, not only were not fresh time-tables substituted, but the old ones continued to be issued to the 25th March, when the plaintiff saw the bill at the office of the defendants, and received one on that very day. Is not this an assertion on the defendants' part that a train would run that evening from Peterborough to Hull? That was a false representation. Did not the defendants know it to be false? Why, the company received notice from the North Eastern Railway Company that the train would be discontinued. The defendants had represented that a train would run to Hull at 7 o'clock, knowing that representation to be false, and the plaintiff acted on the representation, goes to the station, finds there is no train, and suffers a pecuniary loss in consequence. It is an established rule of law, that where a false representation is made knowingly, to which another party gives credence, he has a remedy

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by action against the person who has made the representation in any injury he may sustain therefrom. I am therefore of opinion that the judgment of the court below was right, and ought to be affirmed.

WIGHTMAN, J.—I am of the same opinion. By the publication of the time-table it seems to me that during the whole of March the company undertake, or promise, to any of the public who choose to take tickets, that a train will run to Hull at 7 p.m. It is said that that makes the company liable, even if the train should be prevented from running by inevitable accident; but it seems to me that inevitable accident would come within the limitation in the time-table, that the company only undertook for the train arriving as near the times appointed as may be, and that they are not accountable for delay. I think that the time-table does amount to a holding out a promise to the public, and that there is a contract created if A. presents himself at the station for a ticket, according to the announcement in the time-table. But whether or not there is such a contract, I am of opinion that the defendants are liable in an action upon the case, because they have induced the plaintiff to do an act to his prejudice by their false representation, which they knew to be false.

CROMPTON, J.—I am also of opinion that the plaintiff is entitled to recover. I agree with what has been said, that an action for deceit would lie against the defendants. They state a matter which is false in their own knowledge. They hold out that false representation to everybody who reads their time-table. And I am also inclined to think that an action for breach of duty would lie against the company for not taking passengers according to their announcements in the time-tables. It is laid down in Story on Bailments, that it is the duty of carriers to take passengers when they present themselves according to the professed announcements of the carriers. It would be very dangerous not to hold railway companies public carriers for passengers. But I entertain some doubts whether a contract can be implied from the announcements in time-tables; but I do not think it necessary to decide whether they hold out a general promise to the world. At the same time I do not mean to say that this may not be the case.

*Judgment affirmed.*



## COURT OF EXCHEQUER.

*January 16, 1856.***WILEY v. THE NORTH STAFFORDSHIRE RAILWAY COMPANY.**

*County Court appeal—Action against railway company for nondelivery  
—Companies using a joint station—Liability for laches.*

*The plaintiff brought his action against the railway company for nondelivery of certain goods sent for the purpose of exhibition at an agricultural meeting:*

*Held, that the judge of the County Court was right in leaving the amount of damages to the jury.*

**APPEAL** from the decision of the judge of the County Court of Cheshire, holden at Nantwich.

**This** was an action brought to recover the sum of 35*l.* by way of damages, on the grounds stated in the following particulars:—

**To** loss sustained by the plaintiff in his trade or business £ s. d.

ness of an ironmonger and vendor of agricultural machines and implements, through the nondelivery of a quantity of such agricultural machines and implements in due time at the show-yard of the recent show of the South Cheshire Agricultural Society, held at Congleton, in the county of Cheshire, on the 6th day of September last, which said machines and implements were delivered into the custody of the said company for that purpose, at their station at Crewe, in the said county of Chester, on the 5th day of September last, at 10 30 a.m. ...

30 0 0

**To** expenses thereby wrongfully occasioned to the said plaintiff by the said defendants in regard to the said machines and implements, and in and about the transportation thereof to and from ...

5 0 0

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£35 0 0

**The** following statement comprises (in substance) the whole of the evidence adduced by the plaintiff, the defendants not calling witnesses.

**The** London and North Western Railway and the North Staffordshire Railway unite near to Crewe, in the county of Chester, which station is the terminus in that direction of the North Stafford-



y) is now the nearest and most direct route, and which shall under the control of the London and North-Western Company, any part of their railway, shall be delivered or tendered to North Staffordshire Railway Company at the junction at or Crewe, or at the junction at Macclesfield, as the case may be by them conveyed on their line of railway between Crewe and Willington or Derby, or Macclesfield and Willington or Derby; and all the traffic from any of the eastern districts of Lancashire, or from any part of the North Staffordshire line of railway to Liverpool or Chester or Manchester, or to any place between Liverpool and Crewe or between Chester and Crewe, or to any place between Manchester and Macclesfield which shall be under the control of the North Staffordshire Railway Company carried by them over any part of their railway, shall be delivered or tendered by the North Staffordshire Railway Company to the London and North-Western Railway Company at the junction at or near Crewe, or at the junction at Macclesfield, as the case may be, to be by them conveyed over their line of railway to Liverpool, Chester or Manchester, or to any place between Liverpool and Crewe or between Chester and Crewe, or to any place between Manchester and Macclesfield; and the London and North-Western Railway Company shall afford all reasonable facilities for the transmission of the traffic which shall be tendered to them as aforesaid, and all other traffic which shall originate at any station on the North Staffordshire Railway."

thirteenth article: "That the North Staffordshire Railway Company shall not, under any circumstances, run any trains, coaches and carriages, over or upon the London and North-Western lines of railway or any or either of them, or any part thereof, without the consent in writing of the London and North-Western Railway Company for that purpose first had and obtained."

It was admitted that no other portion of this deed would affect the questions at issue in this action, and no further evidence was needed as to the pecuniary or other arrangement between the two companies. It was shown that the London and North-Western and the North Staffordshire Company were respectively carriers of the whole of their own lines, but not over the lines of each other; and there was no proof that the London and North-Western Company had ever given such written consent as was required by the deed of arrangement to the passing of North Staffordshire, coaches, engines, &c. over their railways.

On the 5th September, 1854, the plaintiff sent a quantity of cultural implements, with proper directions to be forwarded to Crewe to Congleton, a station on the North Staffordshire Railway, intending to exhibit them at the South Cheshire Agricultural Show, which was held at Congleton on the 6th September.

The goods were delivered at Crewe station, where they were received in the customary way by the London and North-Western Company's servants, and loaded in one of their own trucks in

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sending them was defeated, and the goods without being unpacked.

The plaintiff's right of action against one was not denied by the defendants; but it was the London and North-Western Company a station and the first portion of railway over to pass, and their servants received the goods the mutual rights and liabilities of the two plaintiff's right of action was against the London Company, and not against the North & Company.

It was urged, on the other hand, that the brought against the North Staffordshire Company common carriers from Crewe to Congleton, as performed by the London and North-Western of receivers, brokers and porters for and on Staffordshire Company.

The County Court judge declined to nonsuit of opinion that it was a question for the jury.

The plaintiff Cawley was examined and cross-examination on either side, as to the mode of adopted in arriving at 30*l.* over and above 1*l.* as the amount of damage he supposed he admitted that he had no other data than the and the orders he had received at and arising from tural exhibitions of the like kind, though on.

The County Court judge left it to the jury turned upon the character in which the London and North-Western Railway Company received the goods if they undertook to convey them to Congleton the contracting parties, and ought to have been then there would be a verdict for the plaintiff. The jury thought that the London and No

if they were of opinion that he had sustained an injury that defendants were primarily and legally responsible, and of what was a reasonable amount of compensation to them, as it would in a case of assault and battery or

returned a verdict, damages, 20*l*.

the Court should be of opinion that the action could not be maintained against defendants, then a nonsuit to be entered.

The Court should be of opinion that the mode of leaving the damages to the jury was incorrect, then a new trial was

granted, for the appellants, the defendants below, was stopped at the Court.

The respondent was not called on.

COURT.—The jury have said what they think was a fair amount of damages, and we see no reason to interpose.

*Judgment for the respondent.*

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## COURT OF EXCHEQUER.

*January 26, 1856.*

HEWSTON v. PHILLIPS.

*County Court Act—Legacy—Jurisdiction of County Court.*

*A legacy is given by a will to a party without any trust being attached to it, so that it becomes a direct and specific legacy, the County Courts, under the 9 & 10 Vict. c. 95, s. 65, have jurisdiction;*

*if a legacy is given to a trustee for another person, and it is not in examination of the accounts of the testator's estate to ascertain first, whether there are funds sufficient, &c., then the legatee is not the trustee in the County Court, as it would be for a breach of trust, and the County Courts have no jurisdiction.*

MR. ARD moved for a writ of prohibition to the judge of the County Court of Lancashire, to stay all further proceedings upon this plaint in that Court. The action was for 50*l*., the amount of a legacy for a larger sum, the plaintiff having been abandoned to give the County Court an opportunity of jurisdiction. The defendant Mr. Phillips was the trustee under a will which gave to the plaintiff the legacy. The County Court Act, 9 & 10 Vict. c. 95, s. 65, gives jurisdiction where a specific legacy is given direct without this being the creation of a trust, and not cognizable by a

used balance of a partnership account or the amount of a distributive share under an intestate will." In *Pears v. Wilson*, 6 Ex. 833, where property was left by will to executors upon the condition that they should pay certain legacies to certain persons, it was held that the share in such a legacy was within the meaning of the 65th section of the Statute of Wills, and that the County Court had jurisdiction to entertain a claim made by one of such persons for his share of the legacy. Unless this case is overruled, the County Court had jurisdiction in this case, and the writ of prohibition should be discharged. It was so ordered by the Court, and delivered by Parke, Chief Justice, in presence of Lord Chancellor Cranworth. It is interesting to have consulted Lord Cranworth upon the question of the County Court with us in thinking that this is a legacy. It includes a trust, for in a certain sense it is a legacy to pay it to the legatee," &c. [BRAMWELL, J.] to enforce the payment of a legacy given to a person, not seeking to enforce a trust against the executor in this case, the present defendant, and said all the debts had been paid. The case of *Pears v. Wilson* has since been considered by the Queen's Bench, in *Re Fuller*, 2 Ell. & Bl. 257, where it was said: "In *Pears v. Wilson* the distinction was made between an action for a legacy and a suit for the performance of a trust. In that case it was held to be a legacy, and not a trust. And subsequently he says, the distinction in *Wilson* is between a bequest of a legacy where the property is in trust than the simple one imposed on an executor to pay a bequest in trust. That raises a very nice question."

**BRAMWELL, B.**—The case of *Pears v. Wilson* is a different case *this*; it is not the mere calling a man a trustee that makes him trustee. Lord Cranworth was asked if, in that case, it was a *tray*; he thought it was, and by that it means it was a mere *tray*. That case is not, I think, an authority against the principle we are now deciding. What is the present case as against the defendant under the testator's will? Is it not a mere trust? *It certainly* seems to be, and is a mere charge against him as trustee; it is a complaint against him for a breach of trust, and nothing else, and as such, the County Court, I think, has no objection.

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*Rule absolute for a prohibition.*

## COURT OF COMMON PLEAS.

January 23, 1856.

MIDLAND RAILWAY COMPANY (Appellants) v. BROMLEY  
(Respondent.)

*County Court appeal.*

The plaintiff in the County Court was a passenger by the defendants' railway from Gloucester to Bristol. When he arrived at the Bristol terminus of the defendants' railway, he told a porter of the defendants that he wished to proceed by the Bristol and Exeter Railway by a train then about to start to Torquay. He saw the porter place his portmanteau with other luggage on a truck, and proceed with it up an incline towards the Bristol and Exeter Railway platform, which adjoined that of the defendants. He afterwards saw the truck upon the platform, but did not see the portmanteau upon it. It did not arrive at Torquay.

**Held**, that it not being stated that the plaintiff looked for the portmanteau upon the truck, there was no evidence to go to the jury of the portmanteau having been lost by the defendants, there being no preponderating evidence either way, but being as much consistent with its being lost by the Bristol and Exeter Railway Company as by the defendants.

**THIS** was an action brought in the County Court of Gloucestershire, holden at Bristol, to recover the sum of 27l. 16s., the value of a portmanteau and its contents, alleged to have been lost by the carelessness of the defendants' servants. The plaintiff, by his plaint alleged, that, on or about the 26th day of April last, he was rightfully possessed of a portmanteau and its contents,

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and on that day plaintiff delivered to the defendants the portmanteau and its contents, and became a passenger by the defendants' railway from Gloucester to Bristol, and the defendants undertook for the usual fare or reward to them paid by the plaintiff, to deliver safely and securely to carry and convey the said plaintiff and his said portmanteau and its contents from Gloucester to Bristol aforesaid, and at the end of the journey to safely and soundly deliver up the same. And for that by the carelessness and negligence of the defendants or their servants the said portmanteau and its contents were wholly lost to the plaintiff.

On the 28th April, 1855, the plaintiff took his place at Gloucester as a passenger by the Midland Railway to Bristol, and his portmanteau was placed in the luggage van. The train arrived at the Bristol terminus later than its usual time, and on its arrival, the plaintiff informed one of the porters of the company that he wished to proceed by the Bristol and Exeter Railway by a train that was then about to start from the terminus of the latter company. This is about fifty yards distant from the terminus of the Midland Railway, and there is an open uncovered space between the two stations. The porter obtained the plaintiff's portmanteau from the platform, where it had been deposited from the luggage-van, and placed it with other luggage on a truck for the purpose of carting it across with such other luggage to the station of the Bristol and Exeter Railway. At the Bristol and Exeter station there are three platforms, one on each side of the line of railway and the other on a branch line. The one nearest to the Midland Railway station was the platform where passengers arriving in Bristol from Exeter alighted; and the more distant one was the platform from which the same train leaving Bristol for Exeter departed. The booking office of the Bristol and Exeter Company is upon the former of these platforms. The plaintiff stated, in the trial, that after his portmanteau was so placed by the porter upon the said truck, he saw the porter with the said truck, upon which the said portmanteau had been placed, enter the Bristol and Exeter station, pass down an incline from the nearest (the arrival) platform, cross the line at the head of the station, and ascend an incline to the furthest (the departure) platform of the Bristol and Exeter Railway; and that he afterwards saw the said truck on the far side of the Bristol and Exeter station, but he did not see the said portmanteau after he saw it on the Midland Railway platform. That he, the plaintiff, whilst the truck was so crossing, went to the booking-office of the Bristol and Exeter Railway to obtain his ticket for Torquay, and having obtained it, went across to the train and asked the guard of the Bristol and Exeter train if his portmanteau was in the luggage van; that the guard told him to take his seat in the train, as it was about to move off, and to inquire for his portmanteau at Torquay; that on his arrival at Torquay he could not find, nor has he since found or heard of, his portmanteau. The learned judge of the County Court decided



there was no delivery of the plaintiff's portmanteau either to or to the Bristol and Exeter Railway Company according to the plaintiff's contract, and so as to determine the defendants' liability, and gave judgment for the plaintiff for 27*l.* 16*s.*, the full amount of his claim.

*Reason* for the appellants.—The plaintiff ought to have proved that the portmanteau was not delivered, and of that he has given no evidence. He saw the porter taking the truck upon which it was placed up the incline towards the platform of the other station, and he did not see it on the truck afterwards; but he cannot say he looked for it and it was not there. It is just the case in *Gilbert v. Dale*, 5 Ad. & Ell. 543.

*Jess*, Serjt. contra.—There is reasonable evidence here that the portmanteau was not on the truck after it passed the dividing line between the two stations. [WILLIAMS, J.—Upon whom is the burden of proof?] The plaintiff must give some evidence of non-delivery. [WILLIAMS, J.—Then is there any case to call upon the defendants for a defence?] They did not call the porter, and ought to have done so. There is a dust of evidence. [JERVIS, C. J.—That will not do; there must be a preponderating evidence. Then it was their duty to deliver it to the person who put it into the van. [JERVIS, C. J.—But you do not think it was not delivered to him.] *Butcher v. London and South-Western Railway Company*, 16 C. B. 13, is an authority in my favour. [JERVIS, C. J.—That report of the case is inaccurate, saying that it was proved that the bag was delivered to the cab. There was no evidence of that.]

JERVIS, C. J.—It seems to me that when the real question is raised the appeal must be allowed. The question is, was it a case to go to the jury? was there evidence preponderating in favour of one side rather than the other, and not equally divided? Assuming the contract as alleged, the plaintiff must prove that it was not fulfilled. If upon the evidence of the trial, the portmanteau appears to have been stolen or lost by the defendants, they are liable. If by the other company, the defendants have performed their contract. In my opinion the case is as much one way as the other. It is as much consistent with its being lost by the one company as by the other.

SWELL, J.—This case falls within the principle laid down in *Peridge, J.*, in *Gilbert v. Dale*, cited by Mr. Phipson. The portmanteau does not get to Torquay; one company lost it or not. The evidence is consistent with either.

WILLIAMS and CROWDER, JJ., concurred.

*Jess*, Serjt.—The court may order either a new trial or a nonsuit. I ask for a nonsuit.

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*Judgment of nonsuit.*

## COURT OF COMMON PLEAS.

*April 22, 1856.*

MAPLES v. PEPPER.

*County Court appeal—Contingent liability—Agreement not discharged by bankruptcy—12 & 13 Vict. c. 105, ss. 145 & 178.**An agreement by tenant from year to year of a certain house to retain the front of it, and that of another adjacent house, to the same state as before certain alterations were made, when he left the premises, do not create a contingent liability within the 178th section of the Bankrupt Law Consolidation Act.**Such an agreement by parol made several years after the commencement of such tenancy, also created by parol, is not a "condition, covenant, or agreement," within the 145th section of the same statute.**Query, as to the case of Slack v. Sharpe, 8 Ad. & Ell. 366.*

**A**PPEAL from the decision of the judge of the County Court of Nottingham, holden at Nottingham, and the following case stated. This was an action for 22l. under the following circumstances:—

The plaintiff, about ten years ago, let to the defendant from year to year, with a half year's notice, certain premises adjacent to a shop previously occupied by the defendant. About seven years ago the defendant applied to the plaintiff for leave to convert the front of these premises into one large shop window, thus removing the street door and making an entry through the party-wall into the old shop.

The plaintiff agreed to permit this, upon condition that at the determination of the tenancy the premises should be restored by the defendant to their original state.

Upon this footing the alterations were effected, and the defendant continued in occupation until a petition for adjudication of bankruptcy was filed against him on the 2nd April, 1855.

The messenger of the Court of Bankruptcy came into possession when, upon the 17th May, the defendant gave notice to the plaintiff that he would deliver up possession under section 145 of the Bankrupt Law Consolidation Act; the assignees having declined, upon the 12th day of the same month. The plaintiff subsequently met the defendant and required him to perform the condition, which the defendant declined to do. The plaintiff thereupon commenced this action which is now taken, by the direction of the judge, to be

"for damages resulting from the noncompliance with the condition upon which the permission to alter was given." The defendant pleaded bankruptcy, and produced his certificate.

The verdict was found for the plaintiff. The questions for the opinion of the court are,

First, whether the condition or agreement above specified, to restore the premises to their previous state, be a condition or agreement within section 145 of the Bankrupt Law Consolidation Act, and

Secondly, whether, in case the court should be of opinion that it is not, the bankrupt is discharged by his certificate, under section 178 of the same act, or under section 200 of the same act. If the court should be of opinion in the affirmative upon either of these questions, the judgment to be entered for the defendant.

*Merewether* for the appellant, the defendant below.—First, as to the second question, this is a liability to pay money on a contingency, and barred by the bankrupt's certificate: (12 & 13 Vict. c. 106, s. 178.) The old cases have no application, as they are none of them based upon words so wide as these; a contingency is the same as any contingency. [CRESSWELL, J.—What is the money demanded here?] Damages for not replacing the window. Buller, J. states the old rule thus: "If the creditor wish to prove a debt under a commission of bankruptcy, it is necessary that he should be able to ascertain the amount of it without the intervention of a jury; and if he be so certain that he can swear to the amount, he is entitled to prove it under the commission:" (*Utterson v. Vernon*, 1 T. R. 539; S. C. reheard, 4 Ib. 570.) That test is adopted by Turner, L. J., in *Ex parte Bateman, re Routledge*, 20 L. J. Bank. Cas. 19, where all the cases on this point are reviewed; he says: "In the present case I can see nothing which can be open to dispute, except the mere question of value; and it is sufficiently proved that there is a market price governing the value of timber." And again, "assuming the petitioner to be content to prove for the market value of this timber, this proof ought to be admitted. If the law be as I have taken it to be, the petitioner might well swear that the bankrupts were indebted to him at the time of the bankruptcy in the value of the timber in question." Applying those principles to this case, the plaintiff might have claimed what it would be necessary to pay a builder to restore the premises. Then, it is said, "how is the amount to be ascertained?" But that is not more difficult than in other cases. How can the value of annuities be ascertained except by some one performing some of the functions of a jury? Section 145 takes away the landlord's remedy in case certain things are done; and unless he has a remedy under this section he will have none at all. He also cited on this point, and commented on, *Green v. Bicknell*, 8 Ad. & Ell. 701; *Young v. Winter*, 16 Q. B. 401; *Warburgh v. Tucker*, 24 L. J. 317, Q. B.; *Ex parte Barwis, re Strahan*, 25 L. J. Bank. 10. Secondly, the liability to put back the premises into their old condition is a condition in a lease within the 145th section. That section is

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applicable to a parol agreement : (*Slack v. Sharpe*, 8 Ad. & Ell. 366.) If, then, in this case there had been a written lease and covenants to repair in it, there would have been a breach of the general covenant (*Doe dem. Dalton v. Jones*, 4 B. & Ad. 126), and the defendant would have been relieved under this section; and he is not the less relieved because the agreement is not in writing, nor the condition.

*H. James* for the respondent.—First, as to the second question, the contract was not to pay money on a contingency; but the defendant said, "If you will let me make alterations, I will restore the premises when I leave." At the time of the petition all the liability of the defendant was to repair at a future time. Then it is said that the sum to be paid by the plaintiff to the builder is the correct measure of damages; but the plaintiff need not pay anything at all, and still he would have a good action against the defendant on his contract. Then there was no debt for which an action could have been brought in debt or *indebitatus assumpsit*, and the Court of Bankruptcy would have had to ascertain the damages. It must be argued on the other side that every contract would come under the section, *e. g.* a contract of marriage. How there are two contingencies, and there may, besides, be special damage; the damages are at the time of leaving the premises, and not at the time of petition. This case is different from *Ex parte Bateman*, in which the court would have only had to look at the judgment-roll; but here there is no ingredient which existed in that case, neither the amount of damage nor the means of ascertaining them; there the jury had found the value of the timber. He cited and relied on *Temple v. Pullen*, 8 Ex. 389, and *Ex parte Todd*, 24 L. J. Bank. 20. Secondly, this is not a contract within the 145th section; it was a verbal agreement not incorporated in the terms of the original holding. The tenancy was from year to year, and the terms of it were created at its commencement three years before the agreement in question; but that was no part of the lease or demise which created the yearly tenancy, but separate and distinct, or at least collateral, and the agreement to restore does not apply to the premises demised except in moiety. The defendant agreed not only to restore the plaintiff's portion of the party-wall, but that which belonged to his own house. He agreed to do a certain act. Half the agreement applied to the demised premises, and half did not.

*Mereuether* in reply.—The tenancy begins every year, and therefore this was one of the terms of the holding. If the plaintiff has not entered under the statute, there has been no determination of the tenancy.

*JERVIS, C. J.*—I think that the respondent is entitled to our judgment. The first question is, whether this is a condition within sect. 145, and that is, as I think, answered by the facts pointed out. The original letting was several years ago: a tenancy was created and subsisting; then a new special and independent agreement was made, which is the subject of this action; and without con-

ing whether the Court of Queen's Bench was right or wrong in g that a parol agreement was within the section, that must at ate be contemporaneous with the letting. Then Mr. Mere- er says, that the cause of action is a breach of the general ant to repair, which is a term of the holding; but that is not xause, if the bargain is on a continual holding, there is no uction of the premises, because the premises were taken after iteration. As to the other point, it is a liability to make good ertain amount in the event of the assignees not taking to the ises, and the bankrupt is liable for abandoning them without ring. Therefore there ought to be judgment for the re- lent.

ESSWELL, J.—I am of the same opinion on both points. was no part of any agreement of letting on lease, or of any act for a lease, which would have been transferred to the ees if they had taken it, and therefore it is not within the section. As to the other point, there is no liability to pay y on a contingency, but a liability to repair when the tenancy nates; therefore supposing an end of the tenancy such as to it within the terms of the agreement.

OWDER, J.—I am of the same opinion. This case does not within the 145th section, because the breach of agreement referred to, assuming it may be by parol, must come within terms: "The subsequent nonobservance or nonperformance conditions, covenants or agreements in any such conveyance reement, or lease or agreement for a lease;" and therefore, h probably but for the decision of the Queen's Bench I d have thought that the agreement must have been by ug, still it must be with reference to the letting of the pre- . As to the 178th section I think that this liability has g to do with any contingency, and cannot be brought 1 it.

ILLES, J.—As to the 178th section, to bring the case within it must be a case in which the bankrupt has contracted a lia- to pay money on a contingency; here the liability is to e a building to the same state as when altered, at the deter- ion of the tenancy; therefore not to pay money, but to put a ng into a certain form and condition. True, if he does not, he e liable to pay money in the shape of damages, and therefore may be a liability to pay money, but is it to pay on a contin- ? Certainly not, because it does not arise till he has committed ch, and then it is absolute. Then the 145th section does not , because this agreement is not within the language of the sec- one of the "conditions, covenants or agreements in any con- ce or agreement, or lease or agreement for a lease." Assum- at the case in the Queen's Bench be right, is this one of the on which the tenant held, though not one on which he entered ? s an agreement to do work on the land in consideration of ndlord letting him do an act, without which it would have an act of permissive waste. It is not necessary to go into the

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nor on any agreement did this ever become  
which the tenant held, so as to be a condition  
ment within the 145th section.

*Judgment*

## COURT OF QUEEN'S BENCH.

*April 26, 1856.*

CHALLINER v. BURGESS.

*County Court—Interpleader summons—Want of adjudication.**claimant of goods seized under a County Court execution, who is summoned by interpleader summons before the County Court, but does not prosecute his claim, may sue in the Superior Court for the wrongful conversion, unless it appears there was an adjudication upon the claim in the County Court.***A**CTION for selling, converting and wrongfully depriving the plaintiff of his goods, to wit, certain furniture.

Plea: That one Masters had recovered a judgment in the Sheshire County Court against Topham; that defendant was the high bailiff of the court, and had levied the goods in question on Topham's premises, under an execution upon the judgment; that plaintiff claimed the goods, and an interpleader summons was then obtained, but that plaintiff did not prosecute his claim, but made default, whereupon the goods were sold.

Demurrer to the plea.

*Welsby* in support of the demurrer.—Section 118 of the 9 & 10 Vict. c. 95, enacts that the officer charged with the County Court execution may obtain an interpleader summons, calling the execution-creditor and the claimant before the court; "and the judge shall adjudicate upon such claim and make such order in respect thereof, &c., as to him shall seem fit." This plea is bad, for it does not show any adjudication upon the summons.

*H. Lloyd* in support of the plea.—When once the claim is brought before the County Court, no action can be brought in any other court in respect of the goods until the matter has been determined in the County Court. The plea shows that the matter is still pending in the County Court, and as no adjudication is set out, for all that appears on the record, the County Court may issue a fresh interpleader summons.

By the COURT.—The matter is not *res judicata*, and the plea is a bar to the action.

*Judgment for the plaintiff.*

## COURT OF QUEEN'S BENCH.

May 24, 1856.

## KERNOT v. BAILEY AND ANOTHER.

*County Court—Jurisdiction—Sect. 60 of the 9 & 10 Vict. c. 95—  
Decision of judge—Mandamus.*

*A mandamus is directed to an inferior tribunal in a case only where such tribunal has refused to do the act required to be performed by such mandamus.*

*Upon the hearing of a plaint under section 60 of the 9 & 10 Vict. c. 95, the fact that the whole cause of action arose within the jurisdiction in which the defendant is summoned is a material one for the decision of the judge. Where, therefore, a defendant living within the County Court district of A. was summoned under section 60 to the district of B., it being alleged that the whole cause of action arose within such latter district, and after hearing the evidence for the plaintiff, the County Court judge decided that the whole cause of action did not arise within such district, and therefore nonsuited the plaintiff with costs, and a rule for a mandamus to compel him to hear and adjudicate upon the plaint was moved for, upon the ground that he was wrong in deciding that he had no jurisdiction:*

*Held, that, as the fact of the whole cause of action having arisen within his jurisdiction was one necessary for his decision in the case, and as the judge had heard all the evidence in support of it, and the Superior Court is not a court of appeal in such cases, the decision of the judge was final, and a mandamus ought not to issue.*

**W.** M. COOK moved for a rule calling upon the judge of the County Court of Somersetshire, holden at Bath, to show cause why a mandamus should not issue commanding him to hear and adjudicate upon a certain plaint in the said County Court between Kernot and Bailey and another. It appeared from the affidavit, on which he moved, that a plaint was entered in the before-mentioned County Court, to recover the sum of 50*l.* for goods sold and delivered to the defendants, the summons against them having issued by leave of the judge under sect. 60 of the 9 & 10 Vict. c. 95 (County Courts Act), they being resident in another jurisdiction, but the cause of action having arisen within the Bath district; that upon the hearing of the plaint, on the 18th April last, the plaintiff gave evidence of his claim by proving the ordering and delivering of the goods, when it was objected on the



part of the defendants that the delivery of the goods was in another jurisdiction, and that as the whole cause of action did not arise within the Bath County Court the judge had no jurisdiction to entertain the case; that upon this the case was adjourned to the next court day for the production of additional evidence; and that upon the next hearing the judge nonsuited the plaintiff, on the ground of a want of jurisdiction, and adjudged him to pay the defendants' costs. It was now alleged that the judge was wrong, for that there was sufficient evidence to show that the *whole* cause of action *did arise* within his jurisdiction, and that he ought to have proceeded with the case, and have given judgment on the merits. [COLERIDGE, J.—You say that the judge came to a wrong decision.] He has decided that he had no jurisdiction, when we say that he had. [CROMPTON, J.—He has decided upon the fact of jurisdiction according to the proof before him. We cannot give a *mandamus* to compel him to alter his decision.] He has not decided upon the merits. [COLERIDGE, J.—Upon the plaintiff's own case he has decided that he has no jurisdiction. How can we interfere? If his judgment is correct, he had no jurisdiction. CROMPTON, J.—The fact of jurisdiction was one to be tried, and he has tried it.] The question could only have arisen upon the evidence, the plaintiff would not have disclosed it. [COLERIDGE, J.—You admit that it arises upon the evidence, and that being so, it was for the judge to determine. Had you been on the other side, and had contended that you had not been heard, it would have been a good objection. Here you were heard, and offered all the evidence you had to show that he had jurisdiction. That was certainly a case for his decision.] The plaintiff then has no remedy. [CROMPTON, J.—Yes; the plaintiff can sue the defendants in the right court. He can bring his plaint in the court of the district where the defendants live.] The judge having, as we contend, erroneously decided that he has no jurisdiction and granted costs against us, we cannot go to another court without paying these costs. [COLERIDGE, J.—He decided upon all the evidence you had to produce. CROMPTON, J.—This was not a merely preliminary point, but was an essential question. Cases often are decided in the courts below upon what is suggested to be erroneous grounds, but this court has no power to interfere.] The judge not only decided that he had no jurisdiction, but gave the defendants their costs. [CROMPTON, J.—I think he was right in such a case in doing so.] He stayed execution, however, that this application might be made.

COLERIDGE, J.—I am of opinion that there should be no rule. The writ of *mandamus* proceeds upon this—that the County Court has declined jurisdiction in a case in which it was bound to proceed. Now in this case such has not been the case. One material fact in the case before the County Court was that the whole cause of action arose within its jurisdiction. The plaintiff at the hearing adduced all the evidence he could to prove that the court had jurisdiction; but the judge was of opinion that he had failed in his

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1888.**

**Jurisdiction  
— Sect. 66 of  
Ch. 10 of  
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Report of  
Judge  
Dunham.**

proof. Now, whether or not the judge was right or wrong in his view of the facts is immaterial, for we do not sit here as a court of appeal from his decision. If he heard all the plaintiff's evidence and drew a conclusion from it, he has exercised his jurisdiction, and we ought not to interfere.

ERLE, J.—A *mandamus* never goes to command a party to do an act, unless it appears that he has refused to do it. Here, it appears the County Court judge has done his duty, and does not therefore come within this principle. The judge entered into the trial of the cause, and it was a part of the plaintiff's case to show not only a cause of action, but that the whole cause arose within the jurisdiction, and being therefore bound to prove that, the judge came to the conclusion that the cause of action did not arise within his jurisdiction. He had as much right to decide this, as though it had been any fact of contract.

CROMPTON, J.—Jurisdiction as a general rule is given to the court within whose jurisdiction the defendant resides, and until the case comes on for trial the defendant has no opportunity of questioning the jurisdiction. Then it is that he has the right to do so, and it becomes a material question in the cause whether or not the court has jurisdiction. It is a pure question of fact, and the judge has decided it. He decides that the plaintiff fails as to a material fact. The case is not within the principle upon which this court acts in granting a *mandamus*.

*Rule refused.*

## COURT OF QUEEN'S BENCH.

May 26, 1856.

TUMMONS v. OGLE.

*County Courts Act—Replevin—Removal by defendant into Superior Court—Bond, conditioned to prosecute suit with effect—Forfeiture.*

*A bond given pursuant to section 121 of 9 & 10 Vict. c. 95, upon the removal of a plaint in replevin from the County Court, and conditioned to prosecute the suit with effect, is forfeited if the party removing the action fails in the Superior Court, whether he be the plaintiff or the defendant.*

**T**HIS was an action on a bond, the condition of which, after reciting the commencement of an action of replevin in the County Court of Surrey by the plaintiff against the defendant, and that the defendant had declared to the said court that the title to corporeal hereditaments might come into question in the said suit, and that the damage in respect of which the distress was taken amounted to more than 20*l.*, provided "that if the above-bounden Richard Ogle shall prosecute the said suit with effect and without delay in the court into which it is now about to be removed, and shall prove before the said last-mentioned court that such title as aforesaid is in dispute between the said parties, and that there was ground for believing that the said damage was of greater amount than 20*l.*, then this present obligation to be void," &c.

The declaration, after setting out the condition of the bond, alleged that the said action of replevin was removed by the defendant by *certiorari* into the Court of Exchequer; and assigned as a breach, that the defendant did not prosecute the said suit with effect, and that the plaintiff recovered by the judgment of the Court of Exchequer therein against the defendant the sum of 89*l.* 7*s.* for damages and costs; and also that the defendant did not prove before the said court that the title to any corporeal hereditaments was in dispute, nor did he prove that there was, nor was there any ground for believing that the damage was of greater amount than 20*l.*, whereby the said bond was forfeited, &c.

Plea of defendant Ogle, that before and at the time of the committing of the trespasses by the horses of the said plaintiff as hereinafter in this plea mentioned, he the said defendant was possessed of and in the occupation of certain lands, tenements and hereditaments, situate and being in the parish of Croydon in the

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county of Surrey, called Biggin-hall Farm, and that being in possession thereof, and in such occupation as aforesaid, nine horses of the said plaintiff wrongfully broke and entered certain closes, part and parcel of the said farm, &c., wherefore he the said defendant then distrained the said horses then being in and upon the said closes, as and for and in the name of a distress for the said damage then done and doing as aforesaid, and because the pound of and belonging to the district in which such distress was so made as aforesaid was not sufficient to hold the said horses, he the said defendant then drove the same into a certain yard, part and parcel of the said farm, and there impounded the same for the cause aforesaid. That the said plaintiff made his plaint to the sheriff of the said county, &c., and thereupon the said sheriff replevied and made deliverance of the same to the said plaintiff, &c., and afterwards, to wit, at the then next County Court of the said county, the said plaintiff did appear and levied his plaint, &c., which said plaint is the said action of replevin in the said declaration mentioned. That the plaintiff's attorney was then the clerk of the said court in which the said plaint was so levied as aforesaid; and in the event of a jury being required in the said action of replevin, he the said attorney was, as such clerk, the party to nominate and summon the said jurors, wherefore he the said defendant, knowing that the said sum of 150*l.* was an excessive and exorbitant claim, and believing that a fair and impartial trial would not be had in the said County Court, and that difficult questions of law would arise at the trial of the said cause, and having grounds to believe that the damages in respect of which the said distress was so made as aforesaid were more than the sum of 20*l.*, or that the title to the said lands and hereditaments called Biggin-hall Farm, might and would come into dispute, caused the said writ of *certiorari* to be issued, and thereby removed the said plaint; whereupon the plaintiff declared in the Court of Exchequer,—for that he the said defendant on, &c., in the parish and county aforesaid, in a certain yard, then took the said nine horses of the plaintiff and detained the same, &c.; and thereupon the said defendant well avowed the taking of the said horses, but he said that he took the same in a certain field in the parish and county aforesaid, part and parcel of the said farm, &c., without this, that he took the said horses or any of them in the said place in the said declaration mentioned, and for having a return of the said horses, the said defendant well avowed the taking of the same in the said fields, and justly, &c., because, &c., (tracing the title of defendant to the said fields, and justifying the taking of the horses as a distress damage feasant). And the said plaintiff thereupon took issue on the said defendant's plea, and such proceedings were thereupon had in the said action of replevin, and the same came on to be tried before Wightman, J. at the assizes for the said county holden next after the making of the said distress, when it was proved on the part of the said defendant, that the title to the said farm called Biggin-hall Farm, on which the said distress was so made as aforesaid, was or might

have come in dispute in the said action of replevin, and that the defendant's title was as alleged in the avowry, and that he lawfully distrained the said horses, &c., and that the said defendant had grounds to believe that the damage in respect of which the said distress was taken was of greater amount than 20*l.*, and Wightman, J. thereupon directed a verdict to be entered for the said defendant, when an objection was then taken, on the part of the said plaintiff, that as the said horses were admitted to have been, after the making of the said distress, in the yard of the said defendant, as in the declaration in the said action of replevin mentioned, the verdict must be found in favour of the said plaintiff; and Wightman, J. being of that opinion, an application was then made to him on the part of the said defendant, for permission to amend the said avowry by inserting therein the said several allegations contained in the said avowry, for a return of the said horses, thereby enabling the said defendant to justify the taking of the said distress, &c.; but the said Judge then refused to allow such permission to amend, and such proceedings were thereupon had in the said action of replevin, that the said plaintiff recovered against the said defendant the sum of 89*l.* 7*s.* 2*d.*, as well for the damages which the said plaintiff had sustained by the taking of the said distress as for his costs and charges by him about his suit in that behalf expended, and which sum of 89*l.* 7*s.* 2*d.* was afterwards and before the commencement of this suit paid by the said defendant to the said plaintiff, and accepted by the said plaintiff in satisfaction of the said judgment, and in performance of the said condition of the said bond in the said declaration mentioned.

Demurrer thereto.

*Lush* in support of demurrer.—This bond is given under 9 & 10 Vict. c. 95, s. 121; and the principal question is, as to the meaning of the words in the condition, "prosecute the suit with effect." They are taken from 11 Geo. 2, c. 19, s. 23, and must have the same meaning as has always been given to them in that statute, viz. "prosecute with success:" (*Perrean v. Bevan*, 5 B. & C. 286; *Jackson v. Hanson*, 8 M. & W. 477.) The plea, therefore, is bad; because it admits that the defendant failed in the replevin suit, and it seeks to avoid that admission by showing that it was on a point of pleading only that he failed. [ERLE, J.—In the former statute the words were applied only to a plaintiff, and, so used, they were very reasonable and intelligible; but it is difficult to apply them to a defendant who can hardly be said to prosecute a suit at all.] The County Court Act, however, does expressly require that such a bond shall be given by "either party," on the removal of the plaint into the Superior Court; and the court cannot construe them differently as they are applied to a plaintiff or a defendant. The plaintiff has given a bond to the sheriff in the very same terms, and if he had failed in the suit, he would have forfeited that bond. So, the defendant having failed, has forfeited his bond. But the plea is bad also for other reasons. It only alleges that the defendant proved that the title was, or *might have come*, in

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dispute, which is not in accordance with the statute and might be safely alleged in every case. [CROMPTON, J.—The statute is in the disjunctive—requiring the party who removes the plaint to prove that the title is in dispute, or that he has grounds for believing that the damage exceeded 20*l*.] But the defendant has chosen to give a bond in the conjunctive, and has bound himself to prove both. Lastly, the plea is bad, for not alleging that the Judge certified on the back of the record that the condition of the bond had been fulfilled, because sect. 127 renders the absence of such a certificate conclusive evidence of a forfeiture.

*Malcolm (C. Pollock with him) contra*.—This is altogether a statutory proceeding, and the purpose of the Legislature must, therefore, be considered in construing the words. Under the 11 Geo. 2 the bond is taken only from the plaintiff—and when the plaintiff binds himself to prosecute the suit with effect, that is reasonably held to mean “prosecute with success;” for it is just that he should return the distress if he does not obtain a verdict. But the same words cannot be applied to the defendant in the same sense. The object of the bond given by the defendant, is to secure the plaintiff against the additional costs occasioned by the removal of the cause into the Superior Court; and the plea shows that these have been paid. If he had not paid those costs the bond would have been forfeited, because then he would not have performed his undertaking to do in the suit all that lay upon him. Secondly, although the word “and” may have been used in the bond, that word will be construed as “or,” in order to carry out the intention of the statute, according to the language of which it is sufficient, if the defendant proves either that title was in question, or that he had ground for believing that the damage exceeded 20*l*. Further, though the words of the statute are “is in question,” the meaning is, “may be in question,” because the defendant cannot be supposed to undertake, at an early stage of the proceedings, that at the trial the plaintiff will dispute his title. Lastly, as to the Judge’s certificate, if the plea shows that there is no forfeiture of the bond as alleged in the declaration, the plaintiff’s case is answered, and it is unnecessary to state that the Judge certified the fulfilment of the bond.

*Lush*, in reply, referred to *R. v. Raines*, 1 ELL. & BL. 855; *Stansfeld v. Hellawell*, 7 EXCH. 373; and argued that the bond being forfeited, the plaintiff would be entitled to complete indemnity and might recover in the action on the bond the extra costs of the replevin as between attorney and client.

COLERIGE, J.—I am of opinion that the plaintiff is entitled to our judgment. Several points have been made; but I do not think it would be wise to hazard an opinion on more points than are necessary in the construction of a section so inartificially and obscurely framed as this. On the principal point, however, the argument seems to me clear. There is no doubt that section 121, as well as section 127 of the County Courts Act, was framed with reference to section 23 of 11 Geo. 2, c. 19, and with reference to

both parts of that section; and that appears to me to afford a strong argument for giving to the same words in the modern act the same meaning which they had in the old; and it is not denied that in the old statute the words meant that the party should successfully and without delay prosecute his suit. No doubt, indeed, would have been felt but that the County Courts Act introduces another party to whom the words "prosecute the suit with effect" are not so conveniently applicable. Under the old act the bond was to be taken from the plaintiff only, and to him the words are appropriate; but in the modern act the Legislature has thought proper to introduce the defendant, and to require him to give a bond in the same terms upon removing the suit into the Superior Court. If we could give no effect to the words as applied to a defendant, then we might construe the section as if there were words in it limiting the particular expression to the case of a plaintiff; but that would be doing some violence to the language of the statute, and ought not to be resorted to unless in case of absolute necessity. Looking, however, at the nature of the action of replevin, in which the defendant has always been considered as in some respects an actor, and seeing that in many cases the defendant may have to conduct the case in some sense as a plaintiff, and that there are many steps in a replevin suit in which he may have the opportunity of prosecuting it, I think that a reasonable meaning may be attached to the words as applied to a defendant, and that he may be considered as undertaking to take all the steps which he can, and, so far as in him lies, to prosecute the suit with effect and without delay; and with reference to ultimate success in the suit he ought not to be free from the burden of indemnifying the opposite party in case of failure. There is good reason therefore, as it seems to me, for adhering to the language of the Act of Parliament; and there is no injustice in imposing upon the defendant, as upon the plaintiff, the obligation of prosecuting with effect—that is, of successfully defending the suit.

ERLE, J.—I concur in this judgment, although I felt it my duty to examine with great scrutiny the argument of Mr. Lush, because it did appear to me that this section 121 was not in accordance with the main section, giving jurisdiction to the County Court in personal actions where the debt is under 20*l.*, and title is not in question. Those cases are not within the general jurisdiction, and it seemed to me unaccountable that, whereas in an action of assumpsit or case the party might try in the Superior Court if he chose, yet in replevin he could not do so without giving a bond with two sureties for payment (according to Mr. Lush's argument) of costs between attorney and client if he failed in the suit. Upon the fullest consideration, however, Mr. Lush has convinced me that the statute is so framed; and that though the words used are apt for the case of a plaintiff, they are intelligible as applied to a defendant, especially in replevin, and as they may be applied to a defendant, I am bound to give them effect. I must hold, therefore, that the bond is forfeited; but as to the extent of the

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defendant's liability, I wish to add that I do not at present assent to the position that he is liable for the plaintiff's extra costs as between attorney and client.

COLERIDGE, J. mentioned that CROMPTON, J. entirely concurred in the judgment of the court.

*Judgment for plaintiff.*

### COURT OF EXCHEQUER.

June 19, 1856.

JONES v. JENNER.

*Judgment in the County Court upon a judgment of a Superior Court—Garnishee clause of Common Law Procedure Act, 1854.*

*Where the plaintiff had recovered a judgment in this court, and had issued a plaint in the County Court on that judgment, and an order had been made for payment by instalments, and certain instalments had been paid; this court refused to make an order to allow him to proceed under the garnishee clauses of the Common Law Procedure Act, 1854.*

Lush moved for a rule for an attachment under the garnishee clauses of the Common Law Procedure Act, 1854. The plaintiff recovered a judgment in the Superior Court for 23*l*. He afterwards brought an action on that judgment in the County Court, and an order was made for payment by instalments, and two or three instalments had been paid, and the question now arose whether the plaintiff was less a judgment-creditor of the court in consequence of the proceedings taken in the County Court.

MARTIN, B.—After having gone to the County Court you could not sue out execution here.

POLLOCK, C.B.—Having gone there you must stay there, and make the best of it.

MARTIN, B.—Could you have issued a *fi. fa.*, how could you have given credit for these instalments?

POLLOCK, C.B.—We cannot assist you.

BRAMWELL, B.—Can there be two judgments against a man for the same cause of action? How is that? My only doubt is whether you ought not to be at liberty to proceed under the garnishee clause if you could have issued a *fi. fa.*; but as the Chief Baron and my brother Martin think there is a difficulty, I have no opinion upon the matter.

MARTIN, B.—I think we are to use these garnishee clauses at our discretion.

*Rule refused.*



## COURT OF COMMON PLEAS.

June 10, 1856.

GREAT WESTERN RAILWAY COMPANY v. RIMELL.

*Appeal—Carriers Act—Evidence of felony.*

*Where a parcel was delivered to a railway company to be carried from A. to B., and it appeared that there were eleven parcels in the way-bill and ten in the guard's book: that the parcels, including the one in question, were duly delivered to the guard, and afterwards, in his absence, and without his knowledge, a porter put another parcel in the box, and entered it in the bill, and the guard did not count the parcels till he arrived at B., after stopping at several stations, when the parcel was missing:*

*Held, that there was no evidence that the parcel had been stolen by one of the company's servants.*

*Per Jervis, C.J., where felony is set up as an answer to the protection given to a carrier by the Carriers Act, negligence is immaterial.*

**A**PPEAL from the decision of the judge of the County Court of Gloucester, under the following circumstances:—

The action was brought by the respondent to recover 39*l.* 9*s.*, the value of a parcel of watches delivered by him to the company at Gloucester, to be carried by them to London, and there delivered to the party to whom it was addressed. The parcel was not delivered, and upon inquiry being made, it appeared that there was something wrong in the way-bill of the train in question, for eleven parcels were entered in it, while only ten had been entered in the guard's book. It was proved that one of the company's porters delivered the parcels, including the one in question, to the guard, and afterwards received another, which he, in the absence of the guard, and without his knowledge, put in the parcel carriage and entered in the way-bill. He said that, when he did so, neither of the guards were on the platform. There were three other porters on duty on the platform at the time. After the train had started the guard saw the new parcel entered in the way-bill, but, nevertheless, did not count the parcels till he reached London, when he found the parcel of watches gone. At the trial, on the conclusion of the plaintiff's case, it was urged for the defendants that he ought to be nonsuited, and *Hinton v. Dibbin*, 2 Q. B. 646, and *Butt v. Great Western Railway Company*, 11 C. B. 140, were cited, but on the judge refusing, witnesses were called for the defence.

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The judge told the jury that they must be satisfied, first, that the watches were stolen by the company's servants, and, secondly, that that felony was occasioned by the negligence of the company. The jury found for the plaintiff.

*Phipson* for the appellants.—There is no evidence of any felony by any servant of the company. [He was stopped by the court.]

*J. J. Powell* for the respondents.—First, the defendants were not at liberty to appeal; they took their chance of the verdict. They should have submitted that there was no evidence to go to the jury, and have appealed, if the judge was wrong; but they have not done so, and there is no leave of the judge to come here. [JERVIS, C. J.—That does not get rid of the misdirection; this case ought not to have gone to the jury.] Next, there was evidence to go to the jury. The parcel could only have got out of the box in one of three ways; either it was misdelivered on the road, or stolen by a servant of the company, or by a stranger. [CRESSWELL, J.—By whom do you say that it was stolen?] It is not necessary to show any one in particular. The evidence showed that it was not misdelivered at an intermediate station. [CRESSWELL, J.—Taking the case as stated, what was there which would justify a judge or jury in assuming that there was no misdelivery at any intermediate station?] That is not the precise question. The company might have shown that, and did not. There was no evidence on the point at all. [CRESSWELL, J.—Then you infer that that is evidence that it was not misdelivered.] It is not necessary to show that there was no misdelivery; but of three states of things one is the most probable—then that is evidence to go to the jury. There was no evidence of violence. Then that is evidence that the box was opened with a key, and therefore by a servant; because, if a stranger had a key, the company should have proved that.

JERVIS, C. J.—The judge who tried this cause was mistaken in two respects. He told the jury that, to entitle the plaintiff to a verdict, they must be satisfied that the parcel had been stolen by a servant of the company; and, secondly, that such felony had been facilitated by the negligence of the company or their servants; and I think that he was wrong in leaving the first question to the jury, because there was no evidence whatever which ought to have been left to the jury of a felony of a servant of the company. Unless the courts take this on themselves, the statute which was intended for the protection of companies will be a dead letter. The moment counsel are let loose at the jury on the subject of a poor merchant against a wealthy company, and that these things are always stolen by the porters, the company has no chance with the jury; and I think it is the duty of the judge, wherever there is no evidence, immediately to withdraw the case from the jury and not allow them to misconduct themselves. Secondly, the judge has misconceived *Butt v. Great Western Railway Company*, because, when the company prove a justification under the statute, negligence has nothing to do with it; under the statute, felony by

a servant is a sufficient answer to the defence set up by the company, and negligence has nothing to do with it; but under the carrier's agreement negligence is the sole question, and felony has nothing to do with it. Under the statute felony is an answer, and under the notice negligence; but *Butt v. Great Western Railway Company*, is a case of felony permitted and produced by negligence.

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CRESSWELL, J.—I am of the same opinion. The statute gives protection to a company unless the parcel is lost by the felony of the company's servants; it does not say, unless you suspect it was so lost, but there must be reasonable evidence that it was so lost. Now it has been pointed out that a certain porter was the principal person connected with putting this parcel into the box, but it is admitted that there is no reason to suppose that he stole it, and no one has been pointed out to whom a scintilla of evidence could attach.

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WILLIAMS, J.—I am of the same opinion.

WILLES, J.—This is an abuse of the rule of circumstantial evidence. All the evidence must be consistent with the theory adduced; but in addition to that, there must be one credible fact inconsistent with any other, and here there is nothing of the kind. *Butt's case* is cited as a case on the statute, which it has nothing whatever to do with.

*Judgment for appellants.*

## COURT OF QUEEN'S BENCH.

November 8, 1856.

## PYBUS v. GIBBS AND OTHERS.

*Bond conditioned for due performance of duties of bailiff to a County Court—Discharge of sureties by subsequent alteration in the nature of the office.*

*A., being appointed assistant-bailiff of a County Court under 9 & 10 Vict. c. 95, gave a bond, with two sureties, conditioned for the due execution of all warrants delivered to him; for due performance of the duties of his office conformably to the rules of practice which were then in force or might hereafter be made; for his taking only the fees authorized by schedule D. to that act; and for indemnifying the high bailiff against all loss resulting from his misconduct. By subsequent statutes the jurisdiction of the County Courts was greatly extended, and the duties of the bailiff increased. He was also authorized to take other fees than those specified in schedule D.; and he was empowered to sell under warrants of execution without the intervention of a sworn broker:*

*Held, that the nature of the office was so essentially changed, that the bond was extinguished.*

THIS was an action on a money bond, executed by the defendant Gibbs and the two other defendants as his sureties, the condition of which was, that Gibbs should faithfully perform the duties of the office of assistant-bailiff of the County Court of Northumberland; that he should duly execute warrants and serve summonses; that he should conform to the rules of practice then made or hereafter to be made; that he should take only the fees specified in schedule D. of 9 & 10 Vict. c. 95; and that he should indemnify the plaintiff, the high bailiff of the court by whom he was appointed, from any loss resulting from his misconduct or neglect. The declaration alleged that Gibbs had seized the goods of a wrong person under a warrant of execution, and that damages had consequently been recovered against the plaintiff, and that the defendants had not indemnified him.

Plea, that the bond was given before the passing of 10 & 11 Vict. c. 102, and other statutes extending the jurisdiction of the County Courts; and that the defendant Gibbs had, under the provisions of 12 & 13 Vict. c. 101, s. 10, been authorized to act as a sworn broker.

Demurrer thereto.

*H. Hill* in support of the demurrer.—The duties for breach of

which this action was brought were imposed by the first act of Parliament; and even assuming that the subsequent statutes have altered the nature of the office, that alteration will not affect the validity of the bond so far as the old duties of the office only are concerned. As to the new duties imposed by the latter acts, it may be conceded that the security would not extend to them. He referred to *Oswald v. The Mayor of Berwick* (Jur. August 16, 1856), and to the various County Courts Acts, 9 & 10 Vict. c. 95; 10 & 11 Vict. c. 102; 12 & 13 Vict. c. 101; 13 & 14 Vict. c. 61.

*Knowles contra.*—According to *Oswald v. The Mayor of Berwick*, and *Bonar v. McDonald*, 3 H. L. Cas. 236, this security is altogether extinguished. The condition requires the bailiff to take only the fees in schedule D.; but subsequent statutes have empowered him to take other fees. The condition requires him to execute properly all warrants delivered to him; and subsequent statutes have greatly increased his duties in this respect. The bond contemplates actions for 20*l.* only; but now the jurisdiction is extended to 50*l.*, or by consent to an unlimited amount. When the bond was given he could not sell until the property seized had been appraised by a sworn broker (9 & 10 Vict. c. 95, s. 106); but now he may himself appraise as well as sell. Altogether therefore the nature of the office is altered, and its responsibilities increased. The consequence is that the bond can no longer be enforced.

*H. Hill* in reply.

*Cur. adv. vult.*

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#### JUDGMENT.

*Nov. 8.*—Lord CAMPBELL, C. J.—This was an action of debt on bond, executed by the three defendants. The declaration sets out the condition of the bond, and assigns a breach, and from that it appears that the plaintiff Pybus was appointed high bailiff of the County Court of the county of Northumberland, and that he had appointed the defendant Henry Gibbs one of his bailiffs, and his bond was executed by the defendant Gibbs and the two other defendants, as his securities, with a condition that Gibbs should properly conduct himself—I will state how, more distinctly, by-and-by—but should properly conduct himself in his capacity of bailiff to the high bailiff. Then the breach is assigned, stating that a warrant was directed to issue for levying upon the goods of one Edgar, and that was delivered to the defendant Gibbs, and that he ought to have levied upon the goods of Edgar, but instead of that he levied upon the goods of one Thew; and that Thew brought an action against the now plaintiff, the high bailiff, and recovered damages and costs, which were paid, and that the plaintiff has not been indemnified. There is one plea to the declaration which relies on certain acts of Parliament, passed subsequent to the time when the bond was executed. The bond was executed after the 9 & 10 Vict. c. 95, establishing the County Courts, and it alleges that several acts of Parliament passed after the bond was executed, and then it alleges breaches of duty on

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the part of Gibbs, and that by these acts of Parliament, the nature of the office was so essentially altered that the bond was extinguished before the breach took place. To this plea there is a demurrer; and the question we have to determine is, whether the bond remained in force at the time the alleged act took place. Now the law upon this subject has been lately very much discussed, and may now be considered to be settled by the case of *Oswald v. The Mayor of Berwick*; and the general principle seems to be this, that if, where there is suretyship for the due performance of an office, if, either by the act of the parties, or by act of Parliament, the office is essentially changed, so that the duties of the person for whose good conduct the bond is given are materially altered, so that the peril of the sureties would be increased, the bond is gone, without the consent of the sureties; and even that consent can hardly alter the obligation under the bond. The obligation under the bond would be gone if the name of the office were materially altered, or the nature of the employment was materially altered. That is the doctrine laid down by this court in the case of *Oswald v. The Mayor of Berwick*, and the doctrine was adopted by all the judges of the Exchequer Chamber; although two or three of these judges thought, admitting that doctrine to be well founded, that the judgment of this court was erroneous; but still they admitted the principle that we laid down. It went to the House of Lords, and there the judges were unanimously of opinion that the judgment of this court was right, and the House of Lords gave judgment, affirming the judgment of the Court of Exchequer Chamber; therefore we consider the law and general principle as settled. Now we are to apply that principle to the case at bar, and for that purpose we must consider what the nature of the office was when the bond was given; and then it stood as created by the 9 & 10 Vict., and we are to look at the language of the condition at that time. This was a court—I will give the very words of the act of Parliament—"for the more easy recovery of small debts and demands," and the condition of the bond is, that Gibbs should conduct himself properly as bailiff, "according to the general rules made and to be made for regulating the practice and proceedings of the said court, and did and should well and truly execute and perform the office and duties of bailiff of the said court, and in the execution and performance of such his office and duties conform to the provisions and requisitions of the said act, and to all such general rules as had been or should from time to time be made for regulating the practice and proceedings of the said court in respect to the office and duties of bailiff of the said court." Not according to any alteration that might be made by subsequent acts of Parliament, but only according to the rules for regulating the practice and proceedings of and in respect to the said court; and then the condition goes on to say, "that they shall indemnify the high bailiff for any loss or default for or by reason of the non-execution or performance of his office and duties as such bailiff as aforesaid, or for or by reason

of his receiving or extorting any fee or fees, or any money or reward other than such as is or are set down in the schedule D. to the said act annexed, or for or by reason of any neglect, connivance, omission, act, or default of the said Henry Gibbs, or for or by reason of any cause, matter, or thing in any way relating thereto." Now such was the nature of the office at the time when the bond was executed, and such is the condition of the bond. Now, subsequently to that, there have passed various acts of Parliament, in almost every session of Parliament, respecting the County Courts. There was an act in the 12 & 13 Vict., an act in the 13 & 14 Vict., and an act in the 14 & 15 Vict. Now, by these acts of Parliament the jurisdiction of the court over debts, which was before limited to 20*l.*, is generally extended to 50*l.*, with the power of the court to take cognizance of any cause to any amount, with the consent of the parties expressed in writing before the cause has been decided. Now, since the bond was given, an act has been passed so extending the jurisdiction of the court, making it no longer a court for the recovery of small debts and demands, but a court in the first instance, by the consent of the parties, for trying all manner of causes. Then by one of the acts, the 9 & 10 Vict., which was in force when the bond was given, it was required that before the bailiff should sell goods taken under a warrant, that he should have them valued by a sworn broker, and now he may himself act as broker, and the necessity of having a sworn broker is dispensed with. Then, further, by another act of Parliament, a jurisdiction in bankruptcy is vested in this court; in another act of Parliament there is a jurisdiction given to this court with respect to absconding debtors. A warrant may be directed to the bailiff to be executed which it would be incumbent on the bailiff to execute respecting absconding debtors and respecting bankrupts, and there might be a warrant for him to execute and levy the sum of 10,000*l.*, and he might levy the goods without calling any broker to assess them. Then there is another important enactment in these statutes, namely, that for the fees that were before regulated by schedule D. in the 9 & 10 Vict. there are now other fees payable which the bailiff now is authorized to take, and it will be recollected that part of the condition was, that he should take no fees except those that were specified in schedule D. in the 9 & 10 Vict. Under these circumstances, we are to say whether there is not an essential alteration of the office of bailiff of the County Court; and we think that there is an essential alteration, and that thereby the bond was extinguished before the cause of action arose. The jurisdiction is extended with regard to the amount of debts; the nature of the court is altered; there is bankruptcy introduced; there is jurisdiction with respect to other matters, and a new set of fees is given different from those in schedule D. It seems to be quite clear to my mind that the nature of the office is essentially altered, that it is impossible to contend that the sureties are liable for the nonperformance of the new duties that are imposed

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on the bailiff by the subsequent acts of Parliament, and that Mr. Hill very fairly allowed; but he contended, as this would have been a breach of the duties existing at the time the bond was given, that the sureties are still liable *pro tanto*. I am of opinion that that severance cannot be taken, and that the bond is to be considered as extinguished. Now it would lead to very great inconvenience, and there is no precedent for it that I am aware of, to say that the surety shall be liable for that which is within the original scope of the suretyship, and not for that which is not its object, the whole being done by one officer performing his duties in the execution of the same office; but it is unnecessary to enter into any reasoning upon the subject, because we have an express authority in the case of *Bonar v. McDonald*, which was a case decided in the House of Lords from Scotland, but on a point of law on which I believe the laws of the two countries are exactly the same. That was the case, not of an office, but an employment. It stands on the same footing. There the agent had fresh duties imposed upon him; he, being a clerk, had been guilty of a default within the scope of the original suretyship, and it was for a breach of his duty within the original suretyship that the action was brought against the original sureties, and it was contended there, as here, that although the sureties would not be liable for a breach of new duties imposed on the agent, that the liability would be the same as if there had been no alteration of the employment; but the House of Lords thought otherwise, confirming the judgment of the Court of Session below, and held that after the nature of the employment was essentially altered the bond was void. That case accords with the notion I entertain on the subject, and at all events is a decision of that tribunal by which we are bound. That the bond was extinguished we all think there is no doubt. With regard to hardship, there may be a great hardship on the sureties if we were to hold that they were still liable, but I think there would be no hardship and no inconvenience with respect to this high bailiff or any other high bailiff, because we have annual acts of Parliament changing the nature of this court, and it would be very easy either to have a fresh bond, or to vary the first bond so as to meet the probability of a change in the nature of the office while the bailiff remains in his employment. My brother Maule said, and I concur with him, in *Oswald v. The Mayor of Berwick*, that the bond might be framed so as to continue the liability of the parties, although the nature of the office should be altered after the bond. Therefore it would be easy afterwards to introduce words in the condition to make the bailiff still liable as long as he continues, although the duties he has to perform are altered. For these reasons I am of opinion that the bond is void.

COLERIDGE, J.—I am quite of the same opinion, and my lord has gone so fully through the pleadings and the state of facts that it is unnecessary for me to go over that ground again; therefore I shall have very little to add to what he has said. It is very



well known that the rights and liabilities of sureties by the law of England are settled upon very broad principles of equity; and one of them that is now perfectly well established I take to be this—whether by the alteration of the law, or by the dealings of the parties to the obligation apart from the sureties, the risk of the surety is either in its nature altered or its amount increased so that he may receive damage thereby; if so, the obligation is gone and the surety is discharged. And that seems to me to stand on a very obvious and broad principle of justice. It seems to me that, according to those principles, the party has a right to say, whenever he is sought to be made liable, “This is not the undertaking into which I entered, and, therefore, I am not bound by it.” Now, Mr. Hill did not at all dispute that general principle; but he said, in this case the defendant is liable, because, admitting the fact that the duties of the bailiff were increased and added to, and that there might be some risk if the sureties were then liable co-extensively, still the risk would not be increased, because he said, the bond remained untouched. It did not extend to those duties at all; it remained a valid bond as to the old duties, and the breach in this case was assigned in respect of the nonperformance of one of the original conditions. It seems to me, that in the first place, the fact is not so as Mr. Hill has stated, and that if the fact were as he has stated it, it is then met by the case that my lord has referred to in the House of Lords, which I cannot distinguish in point of principle from the present, where the duties of the principal has been increased without the consent or knowledge of the surety; but the breach in respect of which the surety had the action brought against him, was for the nonperformance of one of the original agreements, and that very point was made in the House of Lords, and the judgment proceeded on that very ground; but I do not concede to Mr. Hill that the fact is as he states. I assume that he is right with regard to the extent of the bond, but even so the risk of the surety in this case is increased as to the discharge of the original duties contemplated in the bond by introduction of the new duties, and the new liabilities which are brought on the plaintiff. I think, if that comes to be considered in point of common sense, it must be so—that anyone being a prudent man would not consider it the same thing to become security for a man in the discharge of certain duties, if those were the only duties he had to perform, and the outside extent of which he would be able to calculate; or become surety for a man discharging some duties, if you knew he was, in addition to those, charged with other duties which involved other liabilities, because in all those matters the solvency of the principal is somewhat to be taken into account before you enter into a contract of suretyship for him. I may know perfectly well that the bailiff I am asked to be surety for is very probably quite able, out of his own means, to discharge anything which may arise from the nonperformance of the duties of the court, the duties of which are limited to 20*l.*; but if I am told beyond that

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he is also to discharge duties for a court that has an unlimited jurisdiction, and also duties arising from bankruptcy affairs and matters of that sort, I consider that that is essentially so much greater, that I am unwilling to enter into the bond: and so with regard to the original duties and original liabilities, the position of the surety in this case is altered by the alteration of the duties; and, therefore, taking it strictly upon Mr. Hill's principle of decision, I say he is not borne out by the fact. On these grounds I am of opinion there should be judgment for the defendant.

WIGHTMAN, J.—I am of the same opinion. It may be taken as a principle of law that a bond by a surety, conditioned for the due performance by his principal of the duties of an office, is null, if the office or duties are so altered as in any degree to increase or vary the risk of the surety. The principle is recognised in many cases, but the case of *Oswald v. The Mayor of Berwick* we consider to be the leading case on that subject, which was decided in the House of Lords. The question in this case is, whether the principle is applicable to it, and whether there has been such an alteration of the office of the principal of the bond, or his duties and liabilities, as would bring the case within the principle, and discharge the sureties. The bond recites that the plaintiff was appointed high bailiff of the County Court of Northumberland, under the stat. 9 & 10 Vict. c. 95; and he had nominated Mr. Gibbs to act for him as bailiff of the court; it was conditioned, among other things, for the due execution by him of all warrants, precepts, and writs issuing out of the court, and directed to the high bailiff, and delivered to him to be executed; and that the defendant would indemnify the plaintiff for all actions or losses he might be liable to for executing or not executing any warrant or writ given to Gibbs, for or by reason of his office. The declaration assigns, as a breach of duty—"That under a warrant and judgment obtained in a suit within the jurisdiction of the court, the defendant Gibbs wrongfully seized in execution the goods of one Edward Thew, who thereupon brought an action against the plaintiff in the Court of Exchequer, and recovered damages and costs against him." For the defendant it was contended that the court and the office of bailiff, as it existed at the time of the making of the bond, was so changed, and the duties so altered and increased, that the defendant was discharged from liability under that bond, and they relied on the effect of several subsequent statutes altering and enlarging the jurisdiction of the court, and increasing the duties of the officers, including the bailiff. By the 13 & 14 Vict. c. 61, the jurisdiction of the County Court is extended from 20*l.* which was the limit under the stat. of 9 & 10 Vict. c. 95, to 50*l.*, and by consent to any amount; and the powers and provisions of the 9 & 10 Vict. c. 95, are extended to the increased jurisdiction. By the 10 & 11 Vict. c. 102, s. 5, the high bailiff of the County Court and his assistants are to act as the messengers in bankruptcy, under the provisions of that act, which is a new jurisdiction to the County Court in bankruptcy and insolvency; and by the 14 & 15 Vict.

c. 52, the judge of the County Court may grant a warrant for the arrest of an absconding debtor to be executed by the bailiff. The effect of these statutes is, beyond all doubt, greatly to increase the duties of the bailiff, more especially in respect to the execution of warrants and processes from the court. The words of the condition as to the duty to execute warrants and other processes are very general: "he is duly to execute all warrants so issuing out of the court and directed to the high bailiff and delivered to him to be executed." These are general words, and therefore in terms include warrants under the increased jurisdiction. But it is admitted that the surety would not be liable in respect of them; but that liability it is said is limited to such warrants as issue from the court under its original jurisdiction, given by the 9 & 10 Vict. c. 95; and it is contended that to the extent of 20*l.*, the jurisdiction by that statute given to the court, the officers and the bailiffs remain the same as under the 9 & 10 Vict. c. 95. But it appears to me that this is a fallacy, and that neither the court nor the office of bailiff are the same after the extension of the jurisdiction to 50*l.*, as they were before. The court as constituted under the 9 & 10 Vict. c. 95, was for the more easy recovery of small debts and demands, limited by the statute to 20*l.* If the court had been converted into a court for the recovery of demands to an unlimited amount, it would hardly be the same court; it would still be a court in which small demands might be recovered. Small sums may be recovered in the courts at Westminster, but they are not considered to be courts for the recovery of small debts. Supposing, instead of increasing the amount to be recovered, the jurisdiction of the court be extended over a dozen additional counties, and the duties of the men vastly increased thereby, can the court of the county be considered a court within the meaning of the bond? It might be well contended that though the extension made the court and the offices substantially different from what they were, that the bond is necessarily still effective for a small part remaining of the original jurisdiction. There is no precedent for such a contention, and the case of *Bonar v. M'Donald* is an authority directly against that. Where the duties and general liabilities of the bailiff, as in this case, are so much increased by the alteration and extension of the court, the risk of the surety and his liability to loss must be increased. The bailiff might be competent, in the opinion of the surety, to execute the duties of his office under a court of the limited jurisdiction established by the 9 & 10 Vict. c. 95, but very incompetent for the performance of those extensive duties which are given to him by the subsequent statute. It appears to me, therefore, in this case the effect of the increased jurisdiction was so to alter the court and the office of bailiff as to affect the liability of the surety to his bond so as to exonerate him accordingly.

ERLE, J.—I concur in this judgment, and I have nothing to add to the statements already made.

*Judgment for defendants.*

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## COURT OF EXCHEQUER.

January 14, 1857.

SPRINGBETT v. KING.

*County Courts Acts—Concurrent jurisdiction—9 & 10 Vict. c. 94, s. 128—15 & 16 Vict. c. 54, s. 4—Costs.*

*In applying to the court or a judge at chambers to certify for costs under 15 & 16 Vict. c. 54, s. 4, it is sufficient for the plaintiff, by his affidavits, to make out a prima facie case that the defendant resides or carries on his business out of the jurisdiction of the County Court in which the cause of action, wholly or in some material point, arose, to entitle him to call upon the defendant to answer such affidavits—therefore, where the plaintiff's affidavit stated that upon inquiry being made at the place where the defendant was employed, for the purpose of ascertaining his residence, that the servant said that the defendant had formerly described himself as of No. 4, St. John's-wood-road, which is out of the jurisdiction of the County Court in which the cause of action arose, and that the deponent verily believed he resided there; and the defendant's attorney swore in answer that defendant did not reside or carry on business at No. 4, St. John's-wood-road, but an affidavit was made by defendant himself; and it was not sworn that defendant resided within the jurisdiction of the said County Court, and the judge made an order giving the plaintiff his costs:*

*Held, that the judge was right in so doing, and the court refused to rescind such order.*

**T**HIS was an action for assault, tried before Pollock, C.B., at the sittings for Middlesex, when a verdict was returned for the plaintiff for 40s., and on an application being made by the plaintiff, the learned judge refused to certify for costs, saying that he thought the case a proper one to be tried in the County Court. Subsequently the plaintiff took out a summons before Bramwell, B., at chambers, under the 15 & 16 Vict. c. 54, s. 4; he there contended that he was entitled to his costs, because it was a case of concurrent jurisdiction, the cause of action not arising wholly, or in some material point, within the jurisdiction of the court within which the defendant dwelt or carried on business at the time of the action brought; and in support it appeared by his affidavits that deponent called at the place where the defendant was employed, for the purpose of ascertaining his residence, and that the servant told him that the defendant had formerly described himself as of No. 4, St. John's-wood-road, and that deponent verily believed he resided there; the cause of action was within

the jurisdiction of the Clerkenwell County Court. In answer to this statement of the plaintiff, it was sworn by the defendant's attorney, that the defendant did not reside or carry on business at No. 4, St. John's-wood-road, nor had he done so during the last three years, but no affidavit to the same or a like effect was made by the defendant himself, nor was it sworn that he did reside or carry on business within the jurisdiction of the Clerkenwell County Court; and on the hearing of the summons the learned judge made his order, giving the plaintiff costs.

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*C. E. Pollock* now moved for a rule, calling on the plaintiff to show cause why that order should not be rescinded. The question is, whether, as a question of principle, the plaintiff, in an application of this nature, is bound to prove that the Superior Court has really concurrent jurisdiction, or whether it is sufficient that he suggest such matter as will cause the judge to call upon the defendant to answer the same on affidavit. [BRAMWELL, B.—I thought that there was some evidence that the defendant lived out of the jurisdiction of the Clerkenwell County Court. Looking at the words of the 4th section of 15 & 16 Vict. c. 54, it is clear the plaintiff must give some evidence; then, as to what amount of evidence is necessary, I will not use the word scintilla, but I think the smallest possible amount of evidence is sufficient to entitle him to call upon the defendant to answer it. POLLOCK, C.B.—In the defendant's affidavit the attorney swears that the defendant does not reside or carry on his business at No. 4, St. John's-wood-road; he might at No. 5; the affidavit does not say that he lived out of the jurisdiction of the Clerkenwell County Court.]—(*Room v. Cottam*, 5 Exch. 820; 20 L. J. 25, Ex.; *Fry v. Whittle*, 6 Exch. 411, 20 L. J. 231, Ex.) [BRAMWELL, B.—In *Room v. Cottam* the court held that the affidavit was bad on special demurrer; that it was insufficient to make out a *prima facie* case; those cases do not help you; they show that there might be a strong suspicion, although no legal evidence; as if a man, on being asked where he lived, said, "I shan't tell you;" that might lead you to form an opinion on the subject prejudicial to him, but it would be no legal evidence. In the present case the defendant, who is the person the most interested, makes no affidavit himself, but leaves it to his attorney to do so.] Then, on the plaintiff making a suggestion which leads the judge to suppose that the residence of the defendant is out of the jurisdiction of the County Court, the court will consider that sufficient to deprive the defendant of his statutory right, unless he comes forward and refutes the suggestion by affidavit.

POLLOCK, C.B.—We cannot grant you a rule, and knowing what I do of the case, I should not refuse it if I could see my way to any other conclusion.

WATSON, B.—I think there was evidence that defendant lived out of the jurisdiction of the County Court, and thought to call upon the defendant for an answer. It is clear there is some evidence, and I think that sufficient.

## COURT OF EXCHEQUER

January 15 and 16, 1857

WHEELER v. PEARSON.

*County Court—9 & 10 Vict. c. 95, s. 60—Place arises—Delivery to carrier.*

*Defendant, residing in London, wrote to plaintiff, an order for plants, from a price list issued by undertook to pay the carriage of all goods order certain amount. The defendant ordered goods and desired that they should be sent by Goode sent the goods as desired, and brought an action of Gloucester, to recover the balance due to him. Held, that the delivery to the carrier was not a delivery, and that the whole cause of action did not arise in the County Court of Gloucester.*

IN this case there had been a plaintiff in the County Court of Gloucester. On an application by the defendant, the court had granted a prohibition to stay proceedings in the County Court. The whole cause of action did not arise within the County Court.

*H. Lloyd*, on the part of the plaintiff, now set aside the prohibition. By the affidavits it appeared that the action was brought to recover the balance due for certain plants, alleged to have been sold by the plaintiff to the defendant. The plaintiff resided in Gloucester, and the defendant in London; the goods were sent by Goode, and the price list published by the plaintiff, in which he

Gloucester, to be carried to the defendant in London. It was contended that the whole cause of action arose at Gloucester; order was given there, and the delivery of the goods to the carrier there by the direction of the defendant was a delivery to

[BRAMWELL, B.—This was not a case of delivery to a carrier of goods that had been already specifically bargained for or sold. If defendant had selected certain goods and given directions to the plaintiff to send them by a certain carrier, it might well be that the whole cause of action arose at Gloucester; but in the present case the plaintiff could not have maintained an action against the carrier for goods bargained and sold, or for goods sold and delivered, until they were received by the defendants in London. No property in these goods passed until they reached the purchaser, and the expense of the carriage was to be borne by the vendor, who might have chosen any other mode of conveyance; it would be strange if, under such circumstances, it should be held that the delivery to the carrier is a delivery to the vendee; the carrier was, in fact, acting as the plaintiff's servant. WATSON, B.—It is a question of fact depending on the circumstances of each particular case, whether the carrier is agent for the purchaser, to receive the goods for him, or agent for the seller to carry them. The act of the purchaser naming the carrier may be taken into consideration in coming to a conclusion, but it is not conclusive in itself. I think it clear that in the present case no action for the price of the goods could have been maintained until they reached the purchaser.] If this is a question of fact, the proper tribunal to determine it is a jury, or the judge of the County Court, who, for such purpose exercises the functions of a jury. No prohibition, therefore, ought to have been issued; there is nothing in this case to remove the ordinary presumption that a delivery to a carrier is a delivery to the purchaser: (*Griffin v. Langfield*, 2 Camp. 255; *Borthwick v. Waltham*, 15 C. B. 501; *Huxham v. Smith*, 2 Camp. 21; *Brown v. Hodgson*, 2 Camp. 36; *King v. Meredith*, 2 Camp. 639; *Dawes v. Peck*, 8 T. R. 350; *Joseph v. Fox*, 3 Camp. 320; *Harwood v. Leicester*, 2 Bos. & P. 667, were cited.)

POLLOCK, C. B.—It is not necessary to review all the cases on the law of carriers. The present case is a question of fact to be drawn from the affidavits. The simple question is, whether the cause of action was complete within the jurisdiction of the County Court of Gloucester. Now if the carrier was the agent of the seller to deliver the goods, the whole cause of action did not arise there. We are all of opinion that he was, and that the prohibition was properly granted.

BRAMWELL and WATSON, BB. concurred.

*Rule refused.*

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*Cause of action*  
—9 & 10 Vict.  
c. 95, s. 60.

January 27, 1857.

PEDERSON v. LOTINGA

*Charter-party—Construction—Demurrage—*

*By a charter-party between a shipowner and a unnamed principal, it was agreed that "for allowed for loading in the Tyne, or the captain for demurrage day by day." And as to one day per keel and a-half, &c., demurrage on one days at 5l. per day." Then came this clause being concluded by L. on behalf of another party liability of the former shall cease as soon as he the owners and master agreeing to rest solely on for freight and demurrage."*

*Held, that the liability of the agent having attached Tyne, was not absolved by this clause, which liability only of the agent should cease, for when vessel was loaded.*

THIS was an appeal by the plaintiff from the judgment of the judge of the County Court of Newcastle. The plaintiff's claim was for 25l. damages for not having loaded according to the charter-party. It appeared that the vessel chartered with coals from the Tyne to Copenhagen began to load on the 13th Oct., and her loading was completed on the 1st Nov., being five days' detention beyond the time allowed for loading by the charter-party.

The plaintiff was the owner of the vessel, and the defendant was a shipbroker, who entered into the charter-party with a foreigner.



7 days at 5*l.* per day." Then came this protecting

charter-party being concluded by N. S. Lotinga on behalf of the charter-party, it is agreed that all liability of the former shall cease as soon as he has shipped the cargo, the owners and master to rest solely on their lien on the cargo for freight and demurrage.

In the close of the plaintiff's case, it was objected that by this clause the liability of the defendant, as agent, for the demurrage shall not cease as soon as the ship was completely loaded, and towards the owner could only rely on his lien on the cargo. The judge being of this opinion, judgment was entered for the defendant. This appeal was then brought.

For the appellant.—The demurrage on loading was payable to the captain day by day, he being on the spot to receive it. As soon as one day's demurrage accrued, he might have sued for it. Such a contract is incompatible with the view of the clause intended to rely on the lien on the cargo for it. The clause does not exempt the defendant from liability for demurrage on the Tyne.

For the defendant.—The object of the clause was to protect the shipbroker, from any liability to charges of this nature, and it is nothing unreasonable in stipulating that when the cargo is a full cargo on board, he shall rely on his lien for this, and that the liability of the broker shall cease.

CAMPBELL, C. J.—At the first I certainly had doubts as to the plaintiff's right to recover, and was inclined to think the County Court was right, and that his view of the matter should be supported; because I thought that the protection clause included demurrage in the Tyne as well as at Copenhagen. On the other argument, and attending more carefully to the facts, I think that the clause applies only to the broker's liability for what may happen at Copenhagen. The captain is to pay demurrage in the Tyne 5*l.* per day, day by day. As soon as, for what the defendant has once become liable, his liability ceases. The judge of the County Court came to a conclusion, and there must be a new trial.

JUDGE, J.—It is conceded that the defendant would be liable for the protecting clause. By the charter the defendant is to pay demurrage in the Tyne day by day, and the protecting clause saying that the liability shall cease when the ship shall be loaded, assumes such liability up to that time, and that an appeal might be brought upon it, and demurrage recovered. The clause "demurrage" occurs twice before the protecting clause, viz., once in relation to demurrage in the Tyne and for demurrage at Copenhagen; and the defendant contends "demurrage" in the protecting clause includes both cases. The difficulty I feel in not seeing my way out of it is, that supposing the plaintiff is bound on such an instrument for the first day's demurrage in the Tyne, what would the defendant's answer be? The proper answer is.

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CROMPTON, J.—The real question is, v demurrage in the protecting clause? Doe in the Tyne or to demurrage at Copenh applies only to the latter. There is a spe usual form, “the captain is to receive 5*l* d That is a very different clause from the de port of discharge. It may be that the cap the Tyne, wants his demurrage day by c day by day in the Tyne, the captain has no protecting clause applies only to the lien That part of the contract relating to the the agent takes on himself.

## COURT OF EXCHEQUER.

*January 13 and 23, 1857.*AWFORD v. PARTRIDGE, *re* A PLAINT IN THE COUNTY COURT OF BEDFORD.*County Court—Jurisdiction—Costs—Prohibition.*

79th section of 9 & 10 Vict. c. 95, merely authorizes the court to declare its incompetency, and direct that the suit shall abate, and does not give the judge power to nonsuit and award costs when the case is out of his jurisdiction.

88th section only refers to cases within the jurisdiction of the County Court, and directs the judge to hear and determine.

*In the present case the plaintiff brought an action in the County Court to recover 4l. 15s. for damages and 1l. 7s. 7d. for costs, and the defendant set up title to land, and the judge thereupon directed a nonsuit and awarded costs to the defendant, this court granted a prohibition, on the ground that the County Court judge had no power to award costs.*

HIS was a motion for a prohibition to the County Court of Bedford; the plaintiff was in trespass, the claim 4l. 15s. damages, and costs 1l. 7s. 7d., making together 6l. 2s. 7d. The defendant at the hearing set up title to the land, and objected that the County Court, under the 58th section 9 & 10 Vict. c. 95, had no jurisdiction of the case, as the title to land was in question; in which the judge of the County Court decided that the title to land was in question, and directed a nonsuit, and awarded costs to the defendant. A rule *nisi* was obtained for a prohibition on the following grounds: first, that the County Court judge had no power to award costs; secondly, that the costs awarded were not such as the County Court judge had power to award, if any, on a claim of a demand below 100s. Under the 91st section of the act.

*Hill (Griffiths with him) showed cause.*—The claim originally was for 4l. 15s. damages, and that, with the amount of costs awarded under the County Court rules, brings the amount above 100s.

By the 58th section the County Court judge is merely ousted of his jurisdiction with respect to the question of title; a discretion as to costs is still allowed him; on the face of this plaintiff the court had jurisdiction. Under the 79th section the judge has power to award costs. The plaintiff is bound to give evidence of something within the jurisdiction, and if he does not he has not given evidence to the satisfaction of the court, and the court may

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award costs. Whether proof has been made or not to the satisfaction of the court, is to be declared at the end of the case, and if the plaintiff's case is not so made out the judge may order judgment for the defendant, or a nonsuit. Then, if this case does not come within the 79th section, it is clearly within the 88th section, which provides that all costs of any action or proceeding in the court, not otherwise provided for, shall be paid by or apportioned between the parties in such manner as the judge shall think fit: (*Milner v. Roden*, 18 L. T. Rep. 98; *Joseph v. Henry*, 16 L. T. Rep. 210; 9 & 10 Vict. c. 95, ss. 58, 79, 88, 91, were referred to.)

*Lush* (Codd with him) contra.—*Milner v. Roden* was not a case of prohibition, and in *Joseph v. Henry* there was a dispute on the facts, and the court said that where that occurred, and they could not see their way to the real state of the facts, they would not grant a prohibition. The proceedings in this court would be somewhat analogous. To an action of trespass the defendant pleads ancient demesne, and the judgment is not a nonsuit, but that the writ be quashed: and there are no costs. In the County Court the only time to apply to the court is, when the case is heard, and the only mode *ore tenus*. Prohibition often is obtained in the middle of a cause; say when the judge has taken time to consider; but when once it is obtained the judge can proceed no further; the whole cause from that moment is *coram non judge*. If the judge gives costs he is dealing with the cause as if he had jurisdiction, but if he have no jurisdiction he can give no costs; all the sections quoted refer to cases where the judge has jurisdiction; the 88th section says, if there is no order the costs shall abide the event. In this case there was no order, and no result, because there was no jurisdiction. It is true that the want of jurisdiction does not appear on the face of the plaint, but it did when the evidence was produced. In truth, the judge did not nonsuit, but said he could not interfere in the matter, and after thus declaring that he had no jurisdiction he awarded costs. The judge had no power, except by the act, and none of the rules framed under the act give him such power. If a judge exceeds his jurisdiction the Superior Court will prohibit so far as the excess is concerned: (Com. Dig. "Abatement," D. & N.; County C. S.; *May v. Burgees*, 24 L. J. 67; C. B.; *Frazer v. Fothergill*, 14 C. B. 299; *Robson v. Brown*, 1 C. B. N. S.; *Finnis v. Paterson*, 3 C. B. 243; *Hockington v. Heck*, 1 Str. 638; *Tanner v. Smallwood*, 3 Lev. 203; *Re Walsh*, 1 Ell. & Bl. 383, were cited.)

*Cur. adv. vult.*

POLLOCK, C. B. (after stating the grounds on which the rule was granted.)—As our decision (the decision of my brother Watson and myself, no other member of the court being present at the argument) is in favour of the motion on the first point, it will not be necessary to give any opinion upon the second. The case was fully argued before us, and we are of opinion that the rule must be made absolute, as we think that the County Court

had no jurisdiction to award costs in the present case. By the 58th section of the 9 & 10 Vict. above mentioned, it is provided that the County Court shall not have cognizance of any suit when title to land comes in question. In this case the title to land did come in question. It was clear that unless empowered so to do by some legislative provision, there was no power to award costs, or proceed further after the want of jurisdiction was established. The case of *Tanner v. Smallwood*, 3 Lev. 203, and other authorities to that effect were cited. It was contended on the part of the defendant that, by the act 9 & 10 Vict. c. 95, s. 79, power to award costs in such a case is given, the enactment being, that "if the plaintiff shall not make proof of his demand to the satisfaction of the court, it shall be lawful for the judge to nonsuit the plaintiff, or to give judgment for the defendant; and in either case, where the defendant shall appear and shall not admit the demand, to award to the defendant, by way of costs and satisfaction for his trouble of attendance, such sum as the judge in his discretion shall think fit; and such sum shall be recoverable from the plaintiff by such ways and means as any debt or damage ordered to be paid by the same court can be recovered." We think that this enactment does not empower the judge to nonsuit and award costs when the case is out of his jurisdiction; but that his power to nonsuit is confined to cases over which the court has jurisdiction. Where the plaintiff might be able conclusively to prove the causes of action mentioned in the summons but for the objection to the jurisdiction on the part of the defendant, the court has merely the power to declare its own incompetency at the trial and direct that the suit shall abate, for the want of jurisdiction is only an abatement of the suit. It was contended during the argument that if the judge had taken time to consider, and in the meantime a prohibition had gone from one of the Superior Courts, he could not have proceeded toward and enforce payment of costs. We think that is so, and furnishes a strong argument that the Legislature never intended that a County Court judge should have jurisdiction to give costs in a case like the present, and we are of opinion, for the same reason, that the provision over costs in the 88th section of the same act only applies to cases within the jurisdiction of the County Court to hear and determine. We are, therefore, of opinion that the prohibition must go.

*Rule absolute for a prohibition.*

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HEARD v. EDEY.

County Court—19 & 20 Vict. c. 108, s. 30—*J Costs.*

*In the case of judgment by default in the Superior Court, where the sum sought to be recovered does not exceed 20l., by the same rule as in the case of a judgment at law. The 19 & 20 Vict. c. 108, s. 30, enacts that "who is brought in one of her Majesty's Superior Courts shall recover a sum not exceeding 20l., and the defendant who suffers judgment by default, the plaintiff shall upon an application to such court or to a judge of such court or judge shall otherwise direct. Held, that it is imperative upon the judge to whom made to make an order for costs in all cases of*

HUGHES showed cause against a rule made by the Court, giving plaintiff his costs in an action for less than 20l., where defendant had been found in default. The learned judge made the order on the ground that plaintiff and defendant dwelt more than twenty miles apart, and no counter affidavits made or used at chambers. Plaintiff dwelt more than twenty miles from defendant, and the only thing open to him, and was bound to make use of his own discretion. This will appear from successive enactments with reference to cases where defendant dwelt more than twenty miles apart. (9 & 10 Vict. c. 95, ss. 128, 129), plaintiff was to recover his costs in any case where the Superior Court had jurisdiction. One of such cases of concurrence is the present), "where plaintiff dwells more than

machinery was altered. By sect. 13, in cases of concurrent jurisdiction, the court was authorized to give plaintiff his costs; the words were, "may give." This raised doubts whether it was imperative on the judge or not, being held discretionary in *Jones v. Harrison*, 20 L. J. 166, Ex., and imperative in *Macdougall v. Paterson*, 11 C. B. 755, and 21 L. J. 27, C. P.; but that question was placed beyond doubt by 15 & 16 Vict. c. 54, s. 4, where "may give" is changed into "shall." The judge, therefore, is bound to allow costs if it be made out on affidavit that the plaintiff dwelt more than twenty miles from defendant. Up to this time, and until last session, judgments by default were specially excepted from the operation of the County Courts Acts as to depriving of costs by 13 & 14 Vict. c. 61, s. 11. No application was necessary to get them, no affidavit required. He referred to *Glynn v. Roberts*, 9 Exch. 253; Parke, B.'s, remarks, 255. The plaintiff got his costs as a matter of course, whether it was a case of concurrent jurisdiction or not. This was altered by the last act: (19 & 20 Vict. c. 108, s. 30.) That section enacts that, where an action is brought in a Superior Court to recover a sum not exceeding 20*l.* and the defendant suffers judgment by default, the plaintiff shall recover no costs unless, upon an application to such court or a judge, such judge or court shall otherwise order. It is submitted that this only removes the exception of "judgment by default;" 13 & 14 Vict. c. 61, s. 11, renders them subject to the same incidents as the other cases, where less than 20*l.* is recovered, and brings them within the operation of the former acts, which, by sect. 3 of the last act, "are all to be read as one act where the several provisions are not inconsistent with those of the latter act." Formerly, judgments by default were excepted altogether; but there is nothing in the last act to show that such judgments were to place the plaintiff in a worse position than the verdict of a jury, and it would be unreasonable if it were so. No other or fresh rules are given by sect. 30 by which a judge is to be guided in making the order, and no words used except such as show the intention to give him an absolute discretion, viz., "if he think fit." It is therefore clearly to be inferred he is to make his order in accordance with the rules and principles laid down for him in the former unrepealed acts. By those acts the plaintiff was always entitled to his costs where plaintiff and defendant dwelt more than twenty miles apart: (9 & 10 Vict. c. 95, s. 128; 13 & 14 Vict. c. 61, s. 13; 15 & 16 Vict. c. 54, s. 4.) The fact that a defendant suffers judgment by default ought not to put the plaintiff in a worse position than if he pleaded, in which last case the plaintiff would be absolutely entitled where he dwelt twenty miles from the defendant. It is very desirable to have some definite rules to guide the judges' discretion; and not, in those cases where the costs are the least, like judgments by default, determine the question by the most uncertain and expensive process, viz., by conflicting affidavits, going into the special circumstances of each particular case; and it must be so always if no general rules are

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adopted: (per Jervis, C. J., *Macdougall v. Paterson*, 21 L. J. 21, C. P.) By considering sect. 30 as extending the provisions of previous acts to judgments by default (formerly impliedly or expressly excepted), no violence is done to the language of it, and that act and the former acts (re-enacted thereby) may most consistently be read together; the words "unless a judge shall otherwise direct" meaning, unless he shall otherwise direct in accordance with the rules laid down for his guidance in previous acts in cases of concurrent jurisdiction, all of which still remain unrepealed. It must always be recollected that the provisions of 9 & 10 Vict. c. 95, s. 128, retaining the right to costs in cases of concurrent jurisdiction, have never been repealed, and by that section the plaintiff was entitled to costs "in all actions and proceedings where the plaintiff dwells more than twenty miles from defendant." Words cannot be more express and comprehensive. Even if it is not obligatory on a judge, still it is impossible to say he exercised a wrong discretion in giving them. He has a clear right to take into consideration the fact of residence, which would be in other cases imperative and obligatory, and there are no special circumstances disclosed by the affidavit to prevent his exercising such a discretion. If it be said that plaintiff ought to have delayed bringing his action longer, there is ample justification in the fact that the defendant never paid or offered to pay the amount due. That clearly appears by the affidavits. He might and ought to have paid in the time given by writ, which, under 18 & 19 Vict. c. 67, s. 2, is twelve days. The costs under that act are very small, and under all circumstances the plaintiff ought not to be deprived of them. Nothing has yet been paid, and there are no goods on which to levy.

*Prentice contra.*—The question depends entirely on the construction to be put on the 30th section of 19 & 20 Vict. c. 108. In cases of judgment by default it is not imperative on a judge to give costs under that section, but it was clearly intended that the judge should have a discretion. Martin, B., would have refused the order on the application being made to him at chambers, but referred it to the court on account of the importance of the question. The words of the several acts are essentially different, and the true construction of this section is, that the plaintiff shall recover no costs unless, on application to the court or a judge, the court or judge shall order otherwise. [WATSON, B.—The section says, "unless upon an application to such court," &c.; what does that mean? An application according to the practice of such court. My brothers Martin, Willes and Crowder thought this application must be on summons, and the consequence is, that the costs are doubled.] It is submitted that no summons is necessary, but the order may be made on an *ex parte* application.

Cur. adv. vult.

January 22.

POLLOCK, C. B.—In this case the matter has been referred,



and we have not had the report, but we all agree that the costs ought to be allowed. We think that the rule to rescind the order of my brother Martin should be discharged, but without costs.

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MARTIN, B.—In the case of a judgment by default, the costs are regulated by the same rule as in the case of a judgment after verdict, and all the judges are of opinion that is the correct construction. With respect to whether or not there shall be a summons for them, it has been suggested, and will probably be carried out, that a new indorsement will be given for costs under 20*l*. It will serve all the purpose and save great expense.

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*Rule discharged without costs.*

## COURT OF QUEEN'S BENCH.

January 30, 1857.

SMITH v. PRYSE AND OTHERS.

*Prohibition—Jurisdiction of County Courts as to friendly societies under sect. 44 of 18 & 19 Vict. c. 63.*

*The County Courts have no jurisdiction to decide a dispute between members and officers of uncertified friendly societies, under sect. 44 of the statute 18 & 19 Vict. c. 63, unless a copy of the rules of the society has been deposited with the registrar at the time when the matter of dispute arose. It is not enough that the rules have been deposited before the plaint is entered.*

THIS was a rule calling on the plaintiff to show cause why a writ of prohibition should not issue to the judge of the County Court of Warwickshire, holden at Birmingham, to prohibit him from further proceeding with a plaint, which he had entered in that court, as secretary of the Good Samaritan Lodge of United Brothers, No. 100, against the defendants, as members of that lodge.

It appeared by the affidavit on which the rule was obtained that the plaint was entered and summons issued on the 18th December, 1856, under the provisions of the statute 18 & 19 Vict. c. 63, and that the particulars of demand annexed were as follows:—

“For that at a meeting of the said lodge (being a friendly society within the meaning of the 44th section of the statute

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18 & 19 Vict. c. 63, and being established for certain of the purposes mentioned in sect. 9 of the said act, and for purposes not illegal, having printed rules, a copy of which rules has been deposited with the registrar within the meaning of the said 44th section, and of which said society the plaintiff was the secretary and a member, and which said meeting was held on the 3rd September, 1855), it was resolved that 50*l.* (being certain of the money of the said society) should be deposited in two banks, at 25*l.* each bank; 25*l.* in the savings bank, and 25*l.* in the Birmingham Banking Company; that brothers G. Lewis, John Pryse, John Turland and William Vyse, be depositors for the same; and the rest of the money be placed in the treasurer's hands, to pay the surgeon's and other expenses: and for that the defendants, being three of the persons named in the said resolution, as depositors, unlawfully and in breach of trust, and of their duty as depositors and trustees, and without authority, deposited under colour of the said resolution, certain money of the said society, namely, 60*l.*, being more than they were authorized to deposit, and deposited the same, not in two banks, but in one bank only, and deposited the same in the name of the three defendants only, and not in their names and the name of the said G. Lewis; and afterwards, namely, on or about the 12th May, 1856, drew the said sum of 60*l.* out of the said bank in which the sum had been deposited, and divided the same amongst and retained and paid the same to themselves and other persons not entitled to the same, and of whom the plaintiff was not one whereby the said society has lost the said sum of 60*l.*

"And for that the defendants, on or about the 12th May, 1856, without authority, and in breach of the rules of the said society, took possession of, and retained and paid away to themselves and other persons not entitled to the same, the said sum of 60*l.* of the funds of the said society, whereby the same is lost to the said society.

"And that plaintiff claims that the defendants should be ordered to refund and pay the said sum of 60*l.*, and that further orders and directions be given in this behalf as to the court shall seem just.

"And plaintiff abandons the excess above 50*l.*, and only claims the sum of 50*l.*"

The affidavit disclosed that the society above named had not been established prior to the passing of the 18 & 19 Vict. c. 63; and that its rules had not been certified by the registrar under that act, nor had any copy of the rules been deposited with the registrar on or before the 12th May, 1856, when the matter of complaint arose; but that in the month of June following a copy of rules had been deposited with the registrar by certain members of the society, who dissented from what had been done on the 12th May. The case came on for hearing before the County Court judge on the 14th January, when it was objected by the defendants that he had no jurisdiction to decide the dispute under sect. 44 of the

statute, as the rules had not been deposited when the matter of complaint arose, and the learned judge adjourned the hearing in order that application might be made to this court.

Section 44 of statute 18 & 19 Vict. c. 63, enacts that "in the case of any friendly society established for any of the purposes mentioned in sect. 9 of this act, or for any purpose which is not illegal, having written or printed rules, whose rules have not been certified by the registrar, provided a copy of such rules shall have been deposited with the registrar, every dispute between any member or members of such society and the trustees, treasurer or other officer or the committee of such society, shall be decided in manner hereinbefore provided with respect to disputes, and the decision thereof, in case of societies to be established under this act; and the sections in this act provided for such decision, and also the section in this act which enacts a punishment in case of fraud or imposition by an officer, member or person, shall be applicable to such uncertified societies," &c.

Section 41 provides that "in all friendly societies established under this act or any of the repealed acts, all applications for the removal of any trustee, &c., or for the settlement of disputes that may arise or may have arisen in any society, the rules of which do not prescribe any other mode of settling such disputes, &c., shall be made to the County Court of the district within which the usual or principal place of business of the society shall be situate," &c.

Section 24 provides that if any officer, member or other person, &c., by false representation or imposition shall obtain possession of any moneys, securities, books, papers or other effects of such society, or having the same in his possession, shall withhold or misapply the same, or shall wilfully apply any part of the same to purposes other than those expressed or directed in the rules of such society, or any part thereof, it shall be lawful in England for any justice of the peace, &c., upon complaint, to summon the offender, and for two justices to hear and determine the complaint.

*Kennedy* showed cause.—The rule was obtained upon two grounds: first, that in order to bring this case within sect. 44 of the statute, the rules must have been deposited with the registrar at the time when the act complained of was done; secondly, that the matter of complaint was one to which jurisdiction was given to justices under sect. 24, and not to the County Court. But not much reliance was placed upon the second ground; and as to that it is enough to say that that section relates to the mode of proceeding for a penalty in cases of fraud, and that this proceeding is not taken for any penalty, but simply for the purpose of having a dispute settled under sect. 44. And the main question is, whether under the words of that section the rules must have been deposited when the matter of dispute arose, or whether it is sufficient if they have been deposited when the proceedings in the County Court are commenced. It depends upon sects. 41 and 44 taken together; and the object of the latter is to give to uncertified

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societies the same mode of settling their disputes as is given to certified societies by sect. 41. [COLERIDGE, J.—What court will have jurisdiction if the County Court has not? No court at all, according to the argument on the other side; but as the words of the act do not necessarily import that the rules must have been deposited when the matter arose, and the intention evidently is to give to the County Court a general jurisdiction over all disputes arising in these societies, it lies upon the other side to show clearly that the jurisdiction is excluded in this case. Cases may be cited to show that the jurisdiction of the Superior Courts is taken away by the appointment of special tribunals: (*Timms v. Williams*, 3 Q. B. 413; *Crisp v. Bunbury*, 8 Bing. 394;) but *Burbidge v. Cotton*, 14 Beav. 628, is the other way. [CROMPTON, J.—The latter part of sect. 44 is against you; because, according to your argument, it imposes a punishment retrospectively.] The depositing of the rules does not alter the character of the act; if it was fraudulent, there seems no reason why it should not be punishable equally, whether done before or after the depositing of the rules. [Lord CAMPBELL, C. J.—According to your construction of the statute, the effect of depositing the rules would be to render punishable an act previously done, which was not punishable before.] *Yates v. Roberts*, 3 Drew. 170, affords an argument in favour of the plaintiff in this case; because there the court gave effect to a subsequent registration of the society after the occurrence of the matters in dispute. [COLERIDGE, J.—But that was a case in which the Court of Chancery was exercising its general equitable jurisdiction over trustees.]

*Bittleston* contra.—Upon an examination of the various sections relating to this question, it is obvious that the intention of the Legislature was to confer only upon duly certified societies the special privileges and exemptions given by the statute, including a particular mode of settling disputes; and that, as it was contemplated that disputes might arise in the interval between depositing the rules and obtaining the registrar's certificate, sect. 44 was introduced to provide for the settlement of those disputes. It could not have been intended that the section should apply to disputes arising before any rules were deposited; because, until that has been done, there is no special law by which the members have agreed to be bound. The society cannot be considered as constituted for any purpose until the members have agreed upon certain rules and deposited them with the registrar. (He was stopped by the court.)

Lord CAMPBELL, C. J.—It seems clear, upon the construction of this statute, that the County Court had not jurisdiction in this matter, and the rule must be absolute.

COLERIDGE, WIGHTMAN, and CROMPTON, JJ. concurred.

*Rule absolute.*

## COURT OF EXCHEQUER.

January 31, 1857.

WESTON v. SNEYD.

*County Court—Justice of the peace—Protection of Justices Act (11 & 12 Vict. c. 44, s. 10).*

*A justice of the peace was sued in the County Court for an act done by him in the execution of his office, whereupon he caused notice to be given (under the 11 & 12 Vict. c. 44, s. 10) that he objected to be sued there. Afterwards he obtained a certiorari to remove the County Court proceedings into this court.*

*The plaintiff subsequently brought his action in the Court of Queen's Bench against the defendant:*

*Held, upon motion to quash the certiorari, that the defendant having exercised his election not to be sued in the County Court, there that action should stop, and the certiorari removing it ought to be quashed.*

**T**HIS was an action brought in the County Court against the defendant, a justice of the peace. The Protection of Justices Act, 11 & 12 Vict. c. 44, s. 10, provides that no action shall be brought in any County Court against a justice of the peace for anything done by him in the execution of his office if such justice shall object thereto, and if within six days after being served with a summons in any such action, such justice, or his attorney or agent, shall give a written notice to the plaintiff in such action that he objects to being sued in such County Court for such cause of action, all proceedings afterwards had in such County Court in any such action shall be null and void. The justice (the defendant) gave due notice accordingly to the plaintiff that he objected to be sued in the County Court. The defendant then obtained a *certiorari*, and removed the proceedings in the County Court into this court. Subsequently the plaintiff brought his action against the defendant in the Court of Queen's Bench. A rule having been obtained to show cause why the *certiorari* should not be quashed.

*Huddleston* showed cause.—The defendant is entitled to the *certiorari*. It can scarcely be called a proceeding in a cause, any more than a discontinuance or *stet processus*. [MARTIN, B.—All that the plaintiff desires is, that you should not, to the action in the Queen's Bench, plead another action pending. *Lush* for the plaintiff.—If the defendant will undertake not to plead in that way, it is all the plaintiff desires; he would otherwise be stopped in each action from going on.] The plaintiff may have known the

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*certiorari* issued before he brought his action in the Queen's Bench, he might have proceeded with the first action here. The 11 & 12 Vict. c. 44, s. 10, does not take away the *certiorari*, or the defendant's right to remove the proceedings into the Superior Court. The act says that, after such notice given, &c. as aforesaid, all proceedings afterwards had in such County Court shall be null and void. The *certiorari* directs the County Court judge to send the proceedings to this court. That is not a proceeding afterwards in such County Court as to be void within the meaning of that act of Parliament.

*Lush* contra, not called upon.

POLLOCK, C.B.—This rule must be made absolute; the meaning and good sense of the act is, that if the justice of the peace determines that he will not be sued, or have the action continued in the County Court, and gives his notice accordingly, there is an end of that suit altogether.

MARTIN, B.—I think so; when he has exercised his election of not being sued, or the suit in the County Court continued, there is an end of the matter; and there it must stop.

BRAMWELL, B.—I think so; a *certiorari* should not go where a *procedendo* would not lie. Clearly there could be here no *procedendo*, and, therefore, there should be no *certiorari*.

*Certiorari quashed.*

## BAIL COURT.

*January 31 and February 24.*

EVANS v. MATTHEWS AND ANOTHER.

*County Court—Notice of appeal—Statements of grounds—When objection to, to be taken.**By rule 141 of the County Court rules it is directed that "the notice of appeal shall be in writing, and shall state the grounds on which the party appeals," &c.**Where notice of appeal had been served in due time on each of two defendants, but the notice did not contain the grounds of appeal, and the appellant therefore served a fresh notice, the service of which, however, was not effected upon one of the defendants until after the tenth day (13 & 14 Vict. c. 61, s. 14), and where, upon the case being settled by the attorneys of the parties, the attorney for the respondents took the objection before the County Court judge upon his signing the case, who, however, refused to interfere :**Held (upon a rule to strike out the appeal from the paper in this court), that a statement of the grounds of appeal is not a condition precedent to the jurisdiction of appeal, but a requirement for the information of the court below. The rule therefore was discharged.*

**T**HIS was a rule calling upon the plaintiff to show cause why the appeal herein set down for argument should not be struck out or dismissed on the ground of irregularity in the notice of appeal.

This was an action of replevin tried in the County Court of Cardiganshire, and the plaintiff desiring to appeal, gave within the time limited in that behalf, namely, on the ninth day, notice to all the parties. This notice, however, did not contain the grounds of appeal, and thinking it, therefore, insufficient, on the tenth day he gave a fresh notice, but although he served one of the defendants on that day, the service on the other who lived in the country was effected through the post, the letter being posted on such tenth day, whereby, according to the course of the post, he would not receive it until the next day. The plaintiff had made ineffectual attempts on the tenth day to serve the attorney who had appeared in the County Court for both defendants, but found his office shut up. The case was settled by the attorneys of the respective parties, and on their attending before the judge of the County Court for his signature, the defendant's attorney signed the case with memorandum that he did so subject to the question of the sufficiency of the notice of appeal. The County Court judge declined to enter into that question.

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Notice of appeal  
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By sect. 14 of the 13 & 14 Vict. c. 61, it is enacted that the party who intends to appeal "shall, within ten days after such determination or direction, give notice of such appeal to the other party or his attorney," &c.

By rule 141 of the County Court rules, it is ordered that "the notice of appeal shall be in writing, and shall state the grounds on which the party appeals, and shall be signed by the appellant, his attorney or agent, and such notice shall be sent to the registrar as well as to the successful party, by post or otherwise."

*Lush* showed cause.

*H. Lloyd* contra.

*Cur. adv. vult.*

*Feb. 24.*—*ERLE, J.*—A rule *nisi* was obtained for dismissing an appeal without argument, on the ground that there was no valid notice of appeal within rule 141, for regulating the practice of the County Courts, which requires a notice of appeal to be in writing, and to state the grounds of appeal. It happened that notice of appeal had been properly served on all parties within nine days, but that it did not state the grounds of appeal. A second notice of appeal, stating the grounds, had been within ten days served on the registrar and one defendant, and on the tenth day put into the post for the other defendant, and received by him on the eleventh day; and the appellant had endeavoured to serve notice on the defendant's attorney on the tenth day, but his office was shut up; and there is reason to believe, from the affidavits, for the purpose of preventing service of the notice. The parties had afterwards met before the judge, and the case was properly signed, but the respondent then protested that the notice of appeal was insufficient; and on these facts it was contended that the rule should be made absolute. But I am of opinion that the rule should be discharged. In *Cannon v. Johnson* 21 L. J. 164, Q. B., the same objection was made and overruled. Mr. Justice Patteson's decision shows that a statement of the grounds of appeal is not a condition precedent to the jurisdiction of appeal, but a requirement for the information of the court below. If the parties attend, they may by so doing waive the irregularity, if the judge of the County Court is satisfied with the notice which is for the information of him and the respondent. If the judge in the County Court is satisfied with the notice which is for the information of him and the respondent, this court will receive the notice of appeal, notwithstanding the objection. There is reason, here, from the affidavits, to presume that the respondents and their attorney knew that the appellant was seeking them to serve a regular notice of appeal, and they concealed themselves from him to prevent such notice. If the notice had been left outside the attorney's office, who had shut it on purpose to prevent service, I should be inclined to hold it properly served. I think the judge did right in refusing to sanction the objection, and I further think this rule should be discharged, with costs.

*Rule discharged, with costs.*



## COURT OF QUEEN'S BENCH.

*April 17, 1857.*GORSLETT *v.* HARRIS.*County Court—Application to deprive plaintiff of costs.**Upon an application to deprive the plaintiff of costs, it appeared that the defendant was a builder, who had been employed to fit up certain houses in the County Court district, where a material part of the cause of action arose; and that for the purpose of performing that contract he had set up workshops and counting-houses there:**Held, nevertheless, that as the works there were only set up for the purpose of the particular job, and his permanent residence was elsewhere, he did not carry on his business there within the meaning of the County Court Act.*

**M**ILLWARD moved to deprive the plaintiff of costs. The claim in the action was for 14*l.* 18*s.* 1*d.*, and the question was, whether the superior court had concurrent jurisdiction under sect. 128 of 9 & 10 Vict. c. 95. A large portion of the claim was for goods ordered and delivered at Pimlico, within the district of the Brompton County Court; and the defendant resided in Guilford-street, which was in the district of the Clerkenwell County Court; but it was submitted that the defendant carried on his business at Pimlico, where, according to the affidavits, he had been employed as a builder to fit up the carcasses of several houses, and where as the job was a heavy one, he had found it necessary to set up workshops and counting-houses, and to have clerks and other persons employed there; and where also the necessary materials were delivered.

Lord CAMPBELL, C. J.—But all this is only for the purpose of performing this particular contract, and is only to last whilst the job continues. That being so, he does not carry on his business there within the meaning of the County Court Act. *Rule refused.*

## COURT OF QUEEN'S BENCH.

April 28, 1857.

WARDEN v. STONE.

*High bailiff practising as attorney—Application under Absconding Debtors Act.*

*An application to a County Court judge under 14 & 15 Vict. c. 52, s. 1, for a warrant to arrest an absconding debtor, is not a proceeding in the County Court within the meaning of 9 & 10 Vict. c. 95, s. 29, which imposes a penalty upon the high bailiff of any County Court for practising as attorney or agent for any party in any proceeding in that court.*

**D**ECLARATION for a penalty against the high bailiff of a County Court for having applied to the said court, as attorney for a party, for a warrant to arrest an absconding debtor under the 14 & 15 Vict. c. 52, s. 1.

Demurrer to the declaration.

An issue in fact had also been joined; and upon the trial at the last assizes a verdict was entered for the plaintiff, but a rule to enter it for the defendant had since been obtained, and that rule now came on with the demurrer.

*Atkinson*, Serjt. (*Sowler* and *Brett* with him) showed cause.—The question is, whether an application to a County Court judge under 14 & 15 Vict. c. 52, s. 1, is a proceeding in the County Court within the meaning of sect. 29 of 9 & 10 Vict. c. 95; and it is clearly within the mischief intended to be provided against; for in this very case the warrant, for which the defendant applied as attorney, was directed to him for the purpose of being executed by him as high bailiff. Section 8 shows that it is a proceeding in court, because the debtor may obtain a summons to show cause why the warrant should not be vacated; and the County Court judge is empowered upon hearing both parties to discharge or make absolute such summons, and to direct costs to be paid by either party. Besides by the schedule B, a fee is allowed to the clerks of the County Court on issuing a warrant. [*WIGHTMAN*, J.—The same application may be made to a commissioner in bankruptcy; would it in that case be a proceeding in bankruptcy?] It would be a proceeding in the Court of Bankruptcy. The act certainly requires that the affidavit of the creditor shall be "entitled in one of Her Majesty's superior courts of common law;" and the proceeding therefore is to some extent in the superior court; but it is likewise,

so far as the application for the warrant is concerned, a proceeding in the County Court or Court of Bankruptcy, whenever the application is made to a County Court judge or a bankruptcy commissioner. In *Pybus v. Gibbs*, 26 L. J. 41, Q. B., the judges expressly treat this act as giving a new jurisdiction to the County Court.

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*Milward*, contra, was not called upon.

Lord CAMPBELL, C. J.—Having heard this case fully argued, I retain the opinion I had at first formed, that this cannot be considered a proceeding in the County Court. I do not mean to express any opinion that it was a fit thing for the defendant, the high bailiff, to apply as attorney for a warrant, which was to be directed to himself; I think it would have been much better if he had declined to do so; but the question is, whether this case is within sect. 29 of 9 & 10 Vict. c. 95, which provides that “no clerk, treasurer, high bailiff, or other officer of the court shall, either by himself or his partner, be directly or indirectly engaged as attorney or agent for any party in any proceeding in the said court.” Now I am of opinion that this application for a warrant under 14 & 15 Vict. c. 52, s. 1, was not a proceeding in the County Court; because, although it was a proceeding in which the individual who did the act happened to be a County Court judge, yet he was doing it merely as a special commissioner under the act, and not as a County Court judge. Looking at all the enactments of the statute it seems clear to me that this proceeding is merely auxiliary to the proceedings in the superior court; and that the high bailiff to whom the warrant is directed becomes for that purpose an officer of the court, in which the affidavit is entitled. It is a proceeding *in camera* and not *in curia*; the County Court judge may grant the warrant anywhere within his jurisdiction; and when he has granted it, the matter cannot in my opinion be considered to be confined to his court. I have no doubt that under sect. 8 application might be made by the debtor for his discharge to any other County Court judge or to a bankruptcy commissioner. In *Pybus v. Gibbs* some expressions were used which might convey a notion that this application was considered to be a part of the proceedings of the County Court; but the principle on which that case was decided was clearly this, and this only—that after the giving of the bond subsequent acts of Parliament had enhanced the peril of the sureties by throwing upon the high bailiff new duties, and empowering him to receive higher fees; and quite in harmony with that decision, we may now hold that this is not within sect. 29 of the 9 & 10 Vict. c. 95, a proceeding in the County Court.

WIGHTMAN, J., concurred.

ERLE, J.—I also think that the stat. 14 & 15 Vict. c. 52, s. 1, gives an authority to the person, and does not create a proceeding in court. The words “the judge of any district County Court,” except the County Court judges acting in Middlesex and Surrey,” are merely a *descriptio personarum*, pointing out who are the persons

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to carry out a certain operation auxiliary to the purposes of the superior court.

CROMPTON, J.—This is a proceeding in the court in which the affidavit is entitled; and the persons named in the statute are merely special officers, who are to carry on certain steps in a proceeding in the superior court, on account of the delay which must take place if it was always necessary to come from the country to a judge in London. But the proceedings throughout continue in the court in which the affidavit is entitled; for I apprehend that you cannot go from one superior court to another, but must issue your writ in the court in which the affidavit has been entitled.

*Judgment for the defendant.*

## COURT OF QUEEN'S BENCH.

May 1, 1857.

GETHING v. MORGAN.

*Dangerous animals—Action for injury—Evidence of ferocious disposition—County Court appeal.*

*Upon the trial of an action in the County Court for injury to plaintiff's sheep by defendant's dogs, it was proved that four years before the same dogs had bitten a child eight years old, who was passing through defendant's fold, and that the defendant knew it:*

*Held, that upon this evidence the judge was justified in giving judgment for the plaintiff.*

THIS was an appeal from a decision of the judge of the County Court of Monmouthshire. The action was brought to recover 37l. 4s., the amount of loss which the plaintiff had sustained in consequence of the defendant's dogs having worried and bitten his sheep. The case stated that it was proved upon the trial that about four years before, the same dogs had to the knowledge of the defendant bitten a child eight years old, who was passing through defendant's fold in the daytime. The judge gave judgment for the plaintiff; and the question was, whether there was any evidence to support that decision.

*Gray for the appellant.*—There was no evidence of any habit or disposition in the dogs to worry sheep. If the action had been in the superior court, and the declaration had alleged that the dogs were accustomed to worry and bite sheep, there would have been no evidence to support that allegation: (*Hartley v. Harriman*, 1 B. & Ald. 620.) Lord Ellenborough certainly in that case suggests that the plaintiff "might, perhaps, have stated his ground

of action more generally by alleging that those dogs were of a ferocious nature, and unsafe to be left at large;" but even supposing that the plaintiff in this case had so stated his ground of action, it would not have been supported by the evidence. A single instance of biting a child four years before would be no evidence that the dogs were of a ferocious nature. *Jenkins v. Turner*, Salk. 662, however, rather shows that, even if a general allegation is permitted, the defendant can only be made liable for injury to animals which he knew the dogs to be accustomed to bite. (a) [WIGHTMAN, J.—In *Smith v. Pelah*, 2 Stra. 1264, "the Chief Justice ruled that, if a dog has once bit a man, and the owner, having notice thereof, keeps the dog, and lets him go about or lie at his door, an action will lie against him at the suit of a person who is bit, though it happened by such person's treading on the dog's toes; for it was owing to his not hanging the dog on the first notice. And the safety of the King's subjects ought not afterwards to be endangered."] At all events, if there was a scintilla of evidence here, there was not that degree of reasonable evidence in support of the plaintiff's case as will warrant the court in upholding the verdict: (*Avery v. Bowden*, 26 L. J. 3, Q. B., per Pollock, C.B.)

Lord CAMPBELL, C. J.—I am of opinion that our judgment should be given for the plaintiff, even according to the law of England. According to the law of Scotland there is no occasion to show the previous habits of the animal or the *scienter*; and when an injury has been done to an innocent person, it certainly seems more reasonable that the loss should fall upon the owner of the animal which has done the mischief, than upon the person injured; but I confine myself now to the law of England, which requires the allegation and proof of a previous bad habit known to the master. Now, in the County Court there is no declaration; but according to *Hartley v. Harriman*, it would be enough to allege that the dogs were of a ferocious disposition to the knowledge of the owner. Assuming then the declaration to have been in that form, can it be said that there was in this case no evidence in support of that allegation; when it is found that, four years before, the dogs had bitten a child eight years old as it was passing through the fold in the daytime? In my opinion that was enough evidence to justify the judge in concluding that the dogs were of a ferocious nature. According to the case cited by my brother Wightman one instance of previous ferocity is enough; and though I would not pronounce judgment of *sus. per col.* upon the dog who had so offended, I think he should ever afterwards be cautiously guarded, and that if he is again guilty of ferocious violence, his master must be answerable for it.

WIGHTMAN, J.—The biting of the child was certainly such a

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(a) In the report of *Jenkins v. Turner*, 1 Lord Raymond, 109, it is said by Powell, J., that if a man knowingly keeps a dog accustomed to bite sheep, and afterwards the dog bites a horse, this is actionable.

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circumstance as rendered it incumbent on the defendant to take care of those dogs.

ERLE, J.—I cannot say that it was the duty of the judge to have nonsuited the plaintiff in this case, because the biting of the child may have taken place under such circumstances as to have given the defendant ample notice of the savage disposition of the dog.

CROMPTON, J.—I agree that the question is, whether there was such evidence that a jury could fairly act upon in finding for the plaintiff, and I think there was. In ordinary cases, one previous act of ferocity is enough to put the owner on his guard, and if he afterwards permits his dogs, with knowledge of their vicious disposition, to run about, with tickets of leave as it were, he must be responsible for any further damage which they may do.

*Judgment affirmed with costs.*

## COURT OF COMMON PLEAS.

May 4, 1857.

SWEET v. SEAGER.

*Appeal from the County Court—Metropolis Local Management Act—Compulsory construction of sewers.*

*A tenant at a rack-rent, who covenants "to pay, bear, and discharge all such parliamentary, parochial and county, district and occasional levies, rates, assessments, taxes, charges, impositions, contributions, burdens, duties and services whatsoever, as during his term should be taxed, assessed or imposed upon or in respect of the premises demised," is not entitled to deduct from his rent the cost of a sewer constructed by the district board, for which he has been compelled by the board to pay.*

*Stat. 18 & 19 Vict. c. 120, s. 73, empowers the district board of works to construct a sewer for any house requiring one, and to recover the expense from the owner in manner thereafter provided.*

*By sect. 217 the board may require payment of the costs which the owner may be liable to pay from the occupier, and the owner is to allow the same out of the rent.*

*By sect. 219 it is provided that nothing therein contained shall be taken to affect any contract made or to be made between any owner and occupier of any house, building, or other property, whereof it is or may be agreed that the occupier shall pay and discharge all rates due, and sums of money payable, in respect of such house, building, or other property, or to affect any contract whatever between landlord and tenant.*

*the defendant was the lessee of a house and premises at a rent of 20*l.*, and in his lease (which was a building lease) covenanted during his term to pay all rates and taxes, &c., in the words above set out. He afterwards sublet the premises, at a rack-rent, for the whole term except a few days, to the plaintiff, who covenanted to perform the said covenant contained in the lease to the defendant.*

*The district board constructed a sewer for the said house, and compelled the plaintiff to pay the cost. This the plaintiff wished to deduct from his rent to the defendant who distrained upon him :*

*held, that the plaintiff, the sub-lessee, was prevented by his covenant from deducting the cost of the construction of the sewer from the rent.*

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**SPECIAL case.**—This is an action of replevin, and the defendant avowed for 22*l.* 10*s.*, a quarter's rent due to him from the plaintiff at Christmas, 1856. By an indenture of lease made the 11th Nov. 1849, between Michael Raven of the first part, Catherine Vaughan Austin of the second, and the defendant William Seager of the third part, it is witnessed that in consideration of the expense which the said William Seager had been at in erecting the messuage and buildings thereafter demised, and also of the rents and covenants thereafter reserved and contained, the said Michael Raven demised and leased, and the said Catherine Vaughan Austin demised, leased, and confirmed a piece of ground, situate in the parish of Charlton, in the county of Kent, therein described with said messuage and buildings, unto the said William Seager, his executors, administrators, and assigns, from the 29th Oct. then last, for the term of fifty-nine years, and one half of another year, wanting fifteen days, yielding and paying therefore yearly rent of 20*l.*, without any deduction whatsoever, in respect of any taxes, rates, assessments, impositions, or any other matter thing whatsoever, then already or thereafter to be taxed, rated, assessed and imposed upon or in respect of the said premises, any part thereof, by authority of Parliament, or otherwise whatsoever. And the said indenture of lease contained a covenant by the said W. Seager, that he, his executors, administrators and assigns, would quarterly during the said term pay unto the said Michael Raven, his executors, administrators and assigns, the said rent of 20*l.*, on the several days and times thereinbefore appointed for payment thereof, without any deduction according to the reservation thereof therein contained, and would in like manner receive, bear and discharge all such parliamentary, parochial and other rates, district and occasional levies, rates, assessments, taxes, charges, impositions, contributions, burdens, duties and services whatsoever, as during the same term should be taxed, assessed, or imposed upon or in respect of the said premises thereby demised any part thereof, and would during the said term insure and re-insure the said messuage and buildings from loss or damage by fire, for the sum of 1000*l.* for a term not less than seven years. By an indenture of underlease made the 17th Feb. 1846, between the said defendant William Seager of the one part, and the plaintiff George Sweet of the other part, after reciting the

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above-stated lease to the plaintiff, his executors, administrators and assigns, from the 25th Dec. 1845, for all the residue of the said term of fifty-nine years and a-half, wanting fifteen days, except the last day of the said term, at the yearly rent of 85*l.* for the first year of the said term; at the yearly rent of 90*l.* for the second and subsequent years of the said term, payable quarterly, and a proportionate part at the expiration of the term; and by the same indenture of underlease the said plaintiff covenanted with the defendant that the rent thereby reserved should be paid at the times aforesaid, and that the several conditions and agreements contained in the above-recited indenture of lease on the lessee's part, to be performed and observed (except the covenant to pay the rent thereby reserved, and the covenant to keep the said premises insured from fire) should, during the continuance of that demise, be performed and observed by the plaintiff, his executors, administrators or assigns; and by the same indenture of underlease it is provided that the plaintiff, his executors, administrators or assigns might make void that demise, and the term thereby granted, at the expiration of the first seven, fourteen, or twenty-one years thereof, by giving to the defendant, his executors, administrators, or assigns, six months' notice in writing to that effect, or at any time while the said messuage and premises or any part thereof should be untenable by reason of damage from fire, having continued so untenable for nine calendar months, by giving one week's notice in writing to that effect.

By the Metropolis Local Management Act, 1855, s. 31, schedule B, part 2, the parish of Charlton and other districts are united into a district called the Plumstead district, and placed under the management of a board of works for the purposes of the act. By sect. 73 of the said act, the district board of works is empowered to require the owner of any house, whether built before or after the commencement of the act, situate within one hundred feet of a sewer of sufficient size on a lower level, and found not to be drained by a sufficient drain communicating with some sewer, to make a drain with proper branches from the house to the sewer, with such other works as may appear requisite to the board or their officers; and if the owner of such house or building neglects or refuses so to do, the district board of works is authorized to cause the same to be constructed and made, and to recover the expenses to be incurred thereby from such owner in manner thereafter provided. By sect. 217 of the said act, it is enacted that it shall be lawful for any vestry or district board to require the payment of any costs or expenses which the owner of any premises may be liable to pay under the act from any person who then or at any times thereafter occupies such premises. And the owner shall allow every such occupier to deduct all sums of money which he so pays or which are levied by distress out of the rent from time to time becoming due in respect of the said premises, as if the same had been actually paid to such owner as part of such rent. By sect. 219 of the said act it is provided that nothing therein contained



shall be taken to affect any contract made or to be made between any owner and occupier of any house, building or other property whereof it is or may be agreed that the occupier shall pay and discharge all rates due and sums of money payable in respect of such house, building or other property, or to affect any contract whatever between landlord and tenant. By sect. 250 of the said act, it is enacted that in the construction of the act the word "owner" shall, except for a purpose not material to this case, mean the person for the time being receiving the rack-rent of the land and premises in respect of which the said word is used, whether on his own account, or as agent or trustee for any other person, or who would so receive the same if such land or premises were let at a rack-rent. The house comprised in the stated lease and underlease is within 100 feet of a public sewer, on a lower level, and until the execution of the works hereinafter mentioned was not sufficiently drained into any sewer.

Some time in the month of June 1856 a good and sufficient notice under the said act, by the surveyor to the said board of works, addressed to the plaintiff as owner and occupier of the said house, was left at the said house, requiring him to execute certain drainage works therein specified from the said house into the said sewer, the works authorized by the said act to be done, and giving him notice that if the works were not perfected the said board would cause them to be done, and recover the expenses according to the said statute. Other notices under the said act to the same effect were left at the said house in the month of September 1856. All the said notices were sent by the plaintiff to the said defendant shortly after they were so left at the said house, and before the works hereinafter mentioned were commenced. The drainage works required by the said notices to be constructed were not done by the plaintiff or by the defendant, but were afterwards executed by a person employed by the said board, under the inspection of the surveyor, in the middle of October 1856; and on the 16th of December 1856 the plaintiff was required by the said board to pay, and paid to the said board of works the sum of 27*l*. 16*s*. 8*d*., being the amount of expenses paid by the board for the said works. On the 25th December 1856 the sum of 22*l*. 10*s*. became due from the plaintiff to the defendant for a quarter's rent for the said house and premises reserved by the said underlease. The plaintiff claimed to retain the said sum of 22*l*. 10*s*. in part satisfaction of the said sum of 27*l*. 16*s*. 8*d*. paid to the board on the 22nd January 1857. The defendant distrained the goods of the plaintiff on the said demised premises for the said sum of 22*l*. 10*s*., and on the same day this action of replevin was brought in the County Court by the plaintiff for such distress.

On the 26th of February the cause was tried before the judge of the County Court and adjourned by the court until the 12th March 1857, on which latter day the said judge gave judgment for the defendant, on the ground that the plaintiff, by the terms of his lease, was bound to bear and discharge the costs of executing the

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said drainage works, and was not entitled to deduct the amount from the rent reserved to the defendant. The question for the opinion of the court is, whether the plaintiff is entitled to deduct the said sum of 27*l.* 16*s.* 8*d.* from the rent reserved by the said underlease to the defendant? If the court should be of opinion that the plaintiff is entitled to make the said deduction, then the judgment for the defendant is to be set aside and judgment given for the plaintiff, with such damages as the Court of Common Pleas shall award, or a new trial granted; otherwise the said judgment for the defendant is to stand.

*Milward* for the plaintiff.—The defendant is the owner within the act of Parliament, and is *prima facie* liable. The covenant in the original lease, although it may contain words large enough to cover this expense, is a covenant to pay such impositions as should fall on the original lessor. This expense could never fall upon the original lessor, his rent being not a rack-rent, but a rent reserved upon a building lease. And the covenant in the lease to the plaintiff operates only upon the same subject-matter. Further, this is a penalty, and not a rate, or assessment, or tax; and although there are words in the covenant which may include it, they are to be taken as applicable to things *ejusdem generis* with those mentioned, and do not embrace this: (*Southall v. Ledbitter*, 3 T. R. 458; *Beardmore v. Fox*, 8 T. R. 214; *Barrett v. Duke of Bedford*, 8 T. R. 602.) The cases of *Waller v. Andrews*, 3 M. & W. 312, and *Payne v. Burridge*, 12 M. & W. 727, are distinguishable, as relating to rates over a district, and falling upon a class of persons, whereas this is upon an individual.

*M. Chambers*, Q.C.—The tenant is not entitled to deduct what he paid for the making of this sewer. This is a burden and a duty, and under the covenant of the second lease, which includes all that the covenant of the first lease expresses, the defendant, the lessor, is relieved from it. By that covenant the tenant engages to release the landlord from any burden imposed in respect of the land, and this is one. Secondly, we, as landlord, are relieved from any burden imposed upon the landlord as receiving a rack-rent. The cases cited are distinguishable, *Waller v. Andrews*, and *Payne v. Burridge* did not turn upon the question of the words there being *ejusdem generis*. This is just as much a district rate as if each person was to contribute so much towards a larger sum.

*Milward* in reply.—The whole foundation of my argument is, that the general words in the covenant relate to things of the same class as rate or tax.

COCKBURN, C.J.—We are of opinion that this appeal must be discharged. The act enables the board to order the work to be done by the owner, and if he does not do it, to do it themselves and exact payment from the tenant, who is to indemnify himself out of the rent. *Primâ facie*, then, this expense is payable by the owner, the tenant having a right to deduct what he has been compelled to pay out of the rent. Then comes the covenant in the first lease by the tenant, the present defendant, whereby he expressly cove-

nants to discharge all rates and taxes; then that is incorporated into the sublease, whereby it is agreed that the covenant in the original lease should be performed by the sublessee. It appears to me clear that it was the intention of the first landlord, and of Mr. Seager, that the tenant should bear the landlord harmless in respect of all taxes, rates and impositions of any kind, and I think the words used in the covenant quite sufficiently large to include the duty in question, and that there is a covenant by him to bear the landlord harmless in respect to it. As to the distinction between permanent and district rates, that point was taken in *Payne v. Burridge*, and the Court of Exchequer thought the duty then came within the terms of the act.

CRESSWELL, CROWDER, and WILLES, JJ., concurred.

*Appeal dismissed with costs.*

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## COURT OF QUEEN'S BENCH.

May 6 and 8, 1857.

COOKMAN v. ROSE.

*Insolvency—Judgment summons—Prohibition—19 & 20 Vict. c. 108, s. 2.*

*An order for discharge granted by the Insolvent Court, comprising a judgment-debt in the County Court, takes away from the latter court the power of committing to prison a defendant by a warrant upon a judgment-summons issued for the nonpayment of a debt.*

*A. B. sued C. D. in the County Court for a debt and recovered judgment payable by instalments. C. D. then petitioned the Insolvent Debtors Court, and filed his petition, wherein he included the debt of A. B. He was afterwards duly discharged by that court. Subsequently A. B. took out a judgment-summons against him for nonpayment of the instalments, and at the hearing C. D. gave due proof of his discharge by the Insolvent Court. Notwithstanding this, the judge committed him to prison. Upon this C. D. applied for a prohibition:*

*Held, that as soon as the order for discharge by the Insolvent Court was proved to the satisfaction of the County Court judge, his jurisdiction to commit was at an end.*

**T**HIS was a rule for a prohibition to be directed to the judge of the County Court of Norfolk, sitting at Norwich, prohibiting him from further proceeding upon the judgment-summons against the defendant. It appeared that on the 27th of June 1856 the County Court judge gave judgment for the plaintiff against the defendant upon a plaint for the recovery of a sum of money which

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was ordered to be paid by monthly instalments. On the 7th of the following July the defendant petitioned the Insolvent Debtors Court for his discharge, and filed his schedule, in which was inserted the debt of the plaintiff; and on the 29th of the same month he was in due course discharged. Subsequently the plaintiff took out a judgment-summons, on the ground of the nonpayment of the instalments, and at the hearing the defendant, in answer, gave evidence of his discharge by the Insolvent Debtors Court. The judge, however, thinking he still retained jurisdiction, heard the application, and ultimately ordered the defendant to be committed for forty days. In moving for the present rule, sect. 2 of the 19 & 20 Vict. c. 108, was cited, which repeals the several enactments mentioned in schedule A., and amongst others, "as much of sect. 102" (of the 9 & 10 Vict. c. 95) "as enacts that 'no protection, order or certificate granted by any Court of Bankruptcy or for the Relief of Insolvent Debtors shall be available to discharge any defendant from any commitment' under the order of a judge."

*H. Hill, Q.C.*, showed cause.

*Palmer*, in support of the rule.

The following cases and statutes were cited: *Abley v. Dale*, 11 C. B. 378; *George v. Somers*, 16 C. B. 539; *Ex parte Christie*, 4 Ell. & Bl. 714; 1 & 2 Vict. c. 110, ss. 76, 90, 91; 9 & 10 Vict. c. 95, ss. 98, 99, 102; 19 & 20 Vict. c. 108, s. 2.

*Cur. adv. vult.*

#### JUDGMENT.—May 8.

Lord CAMPBELL, C. J.—In this case the question is, whether the judge of a County Court has jurisdiction to commit a defendant to prison by warrant upon a judgment-summons, issued under the 9 & 10 Vict. c. 95, s. 99, after the defendant has obtained a valid order of discharge under the Insolvent Debtors Act, confirming the judgment-debt in respect of which the judgment-summons was issued. This question was first brought to a decision in *Abley v. Dale*, 11 C. B., and answered in the affirmative from the express words of the statute, notwithstanding the manifest injustice of making a debtor liable to be imprisoned for not paying a debt after the law has taken away from him all his property, and also as making him liable to be imprisoned for misconduct by the Insolvent Commissioner, and liable to be again punished for the same misconduct by the County Court judge, or to be acquitted by the one and found guilty by the other upon the same evidence in respect of the same charge. In *Abley v. Dale* this injustice is recited in the judgment, but the court act on what they consider the general words of the statute. The decision in that case has been followed in *Ex parte Christie*, 4 Ell. & Bl., and *George v. Somers*, 16 C. B., but they both rested on *Abley v. Dale*. Now the express words of the 9 & 10 Vict. c. 95, which led to the judgment in *Abley v. Dale*, are, in our opinion, the words in sect. 102, providing that "no order granted by the Court for the Relief

Insolvent Debtors shall be available to discharge any defendant in any commitment upon any order there mentioned." That is, under sect. 99. In *Abley v. Dale* the court does not mention this section or any section in full, but the judgment is to be read with an argument on which it is given. The argument upon the question of jurisdiction was directed by the court. Mr. Lush, who argued very ably against the jurisdiction, points out sect. 102 in the commencement of his argument as a difficulty he has to attend with; Mr. Hugh Hill, who argued upon the other side as usual, mentioned the same section at the close of his argument as a ground for a decision in his favour. We consider that the discussion which followed was founded upon the section which had been a prominent point of contest in the argument. It also appears to us that the enactment in the 1 & 2 Vict. c. 110, and more particularly sect. 99, would have discharged the defendant from commitment under a warrant upon a judgment-summons if the provision above stated in sect. 102 of the first County Court Act had been omitted. The law as thus declared in *Abley v. Dale* being so manifestly unjust, and we may say absurd, the Legislature by the 19 & 20 Vict. c. 108, s. 2, has repealed that very proviso in sect. 102 of the County Court Act, on which, as we consider, the decision in *Abley v. Dale* must have rested. It is clear to us that the Legislature intended to remedy the acknowledged evil, which had been more than once judicially noticed; and we are of opinion that we give effect to the expressed intention of the Legislature in holding that an order for discharge granted by the Court for the Relief of Insolvent Debtors, committing a judgment-debt in a County Court, does take away from that court the power of committing to prison a defendant by a warrant upon a judgment-summons issued for nonpayment of a debt. Although such commitment may be in some sense punishment for supposed misconduct, it is founded entirely on a judgment-debt: it is granted only at the instance of the judgment-creditor the same as any other; for the prisoner ought to be released as soon as the judgment-creditor is satisfied, although the period of imprisonment under the sentence has not expired. We do not presume to overrule the decisions that have been already given upon these acts as they formerly stood; but we take those acts and decisions with the 19 & 20 Vict. c. 108, and consider that we decide consistently with them by now holding, in this case, that as soon as the order for discharge by the Insolvent Court was moved to the satisfaction of the County Court judge, his jurisdiction to commit was at an end. It follows that a prohibition could issue against such a commitment, and accordingly the rule made absolute.

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*Rule absolute.*

## COURT OF EXCHEQUER.

May 7, 1857.

FOSTER v. RICHARDS.

*County Court Acts—Repeal by 19 & 20 Vict. c. 108—Costs, when less than 20l. is recovered in an action against an officer of the court.*

*The 9 & 10 Vict. c. 95, s. 139, provides that if a plaintiff in an action in the superior court against an officer of a County Court recover less than 20l., he shall not recover any costs; the 19 & 20 Vict. c. 108, repeals this section, except as to acts done under it. Plaintiff brought an action against an officer of a County Court and recovered 10l.; the clause in question was repealed after the cause of action arose, but before the trial:*

*Held, that the defendant having been sued for an act done under the original act, and plaintiff having recovered less than 20l. damages, defendant was entitled to the protection of the 139th clause.*

THIS was an action of trespass against the high bailiff of the County Court of Southwark for the improper taking of goods. At the trial a verdict was returned for the plaintiff, with damages 10l. A rule was subsequently obtained to enter a suggestion, under the County Court Act, 9 & 10 Vict. c. 95, s. 139, to deprive the plaintiff of his costs.

*G. Francis* now showed cause.—By the 139th section of the 9 & 10 Vict. c. 95, it was provided, that if a plaintiff in any action in the superior court against an officer of a County Court did not recover more than 20l., he should not recover any costs, unless the judge certified that the action was fit to be brought in the superior courts. This section, with many others, was repealed by the 19 & 20 Vict. c. 108, "except as to acts done under them," and the contention of the plaintiff now is, that the original clause having been repealed after the cause of action arose, but before the trial, the original clause is absolutely repealed as far as the protection of the defendant is concerned, and the plaintiff is therefore entitled to his costs of suit. The acts contemplated by the saving words of the new statute must be taken to mean acts done by virtue or in pursuance of the clause repealed. Two things must occur; the action must be brought, and more than 20l. must be recovered, to entitle plaintiff to his costs. [POLLOCK, C.B.—There can be no doubt of the intention of the Legislature.

and we ought to try to give effect to that intention without putting a narrow interpretation on the act.] The judge could not have certified here: (*Reg. v. Devon*, 18 Q. B. 761.)

*Hannen* contra, was not called on.

POLLOCK, C.B.—We are all of opinion that we ought to give effect to what we think was the certain intention of the Legislature.

BRAMWELL, B.—The question is, whether this act was done under the original act; if it were so, there could be no doubt. There is great convenience in the rule to give as little retrospective effect to all matters as possible.

*Rule absolute.*

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## COURT OF EXCHEQUER.

June 11, 1857.

### HUNT v. THE NORTH STAFFORDSHIRE RAILWAY COMPANY.

*Action for malicious prosecution—Prohibition.*

*A railway company summoned a passenger before a justice for travelling on the railway without having paid his fare; the charge was dismissed and some expenses ordered; the railway company having been summoned to the County Court for these and other expenses, obtained a prohibition:*

*Held, that the writ of prohibition was rightly issued, as the substance of the action, which the court would look to, was for malicious prosecution, which the County Court had not jurisdiction to try.*

SCOTLAND showed cause against a rule obtained to set aside an order of Coleridge, J., granting a writ of prohibition to the judge of the Staffordshire County Court holden at Stoke-upon-Trent. It appeared that a summons had been issued at the instance of the company against the plaintiff for travelling on their railway without having paid his fare; but there was a mistake about his identity, and the application was dismissed, and certain expenses ordered; and the present action was brought in the County Court to recover 12*l.* 17*s.* 6*d.*, as it was alleged, for expenses of attending before the justices, &c.: yet it really was in substance nothing but an action for malicious prosecution, the particulars of certain expenses being inserted in the plaintiff's particulars of demand to disguise the real form of action. [MARTIN, B.—He is stating the damages instead of stating the real cause of action—what is it if it is not for malicious prosecution?—The action for malicious prose-

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cution is prohibited by the County Court Acts, 9 & 10 Vict. c. 93, and 13 & 14 Vict. c. 61. In *Legge v. Tucker*, 26 L. J. 71, Ex., the question was whether it was contract or tort, as the acts require that a plaintiff should recover above 20*l.* in actions on promise, and above 5*l.* in actions on the case; and the court there said, we must look at the substance of the case and see if the action could have been maintained without any contract; if not, then, whatever the form of complaint, the right of action is founded on contract. *Chivers v. Savage*, 5 Ell. & Bl. 697, arose on a plaint in a County Court for false imprisonment; the evidence was, that the defendant directed the police to arrest the plaintiff on a charge of felony, which the police did. The charge was unfounded in fact. The

judge of the County Court in his judgment used expressions indicating that he gave the damages in respect of the unfounded charge of felony. On a rule for a prohibition it was held that the cause of action alleged in the plaint being one over which the judge had jurisdiction, and the evidence having proved it, prohibition would not lie, even on the assumption that the judge, in estimating the damages erroneously, took into consideration matters the subject of an action for malicious prosecution, and therefore not within his jurisdiction. The court will therefore look to see what the substance of the charge really is.

*Huddleston*, contra, in support of the rule.—The particular in the plaint should decide whether the County Court judge has jurisdiction, and the County Court judge, if he finds when it comes before him that it is for malicious prosecution, will not proceed. It is for him to deal with it when there. But there is no claim made in this plaint for unliquidated damages; the items are for cab hire and certain expenses paid, over which the County Court certainly has power to decide. *Chivers v. Savage* is in favour of the plaintiffs. Will this court prohibit the County Court judge from determining the amount due in respect of these expenses incurred by the wrongful acts of the defendants? Looking at the plaint containing the particulars of the plaintiff's demand—and that it is by which the court would be governed—there is nothing to show this is an action for malicious prosecution; and as the court said in *Chivers v. Savage*, upon a trespass for false imprisonment, the County Court judge had jurisdiction, though there might be other circumstances in the case which would properly be the subject of an action for malicious prosecution.

POLLOCK, C.B.—I am of opinion this rule should be discharged. If this was a plaint to recover money agreed to be paid by the defendant to the plaintiff, why does he not say so? If on any contract the money is claimed, why does the plaintiff not state it? It professes to be in substance this—an action for the expenses of an alleged malicious prosecution. The plaintiff says he was improperly summoned before the magistrates for travelling on the defendants' railway without having paid his fare; the charge being dismissed by the justices, he now claims certain damage for the inconvenience and expense he was occasioned. It is very true no claim is made in



the particulars of the plaintiff's demand for the loss of his reputation. No; but what is stated in the plaint may be recovered in an action for malicious prosecution, and in substance this is an action for malicious prosecution. Mr. Huddleston says it may be that the plaintiff relinquishes any claim in respect of everything else but the mere expenses paid. If that be correct, why did not the plaintiff so state? It seems to me this is in substance an action for malicious prosecution, the damage in part being stated for the cause of action. We must prevent an evasion of the law thus attempted, and the rule must be discharged.

MARTIN, B.—I am of the same opinion. I think my brother Coleridge's order quite right, on the ground that the plaintiff's claim as made is a mere fraud and evasion of the law; but I doubt very much whether, under the circumstances stated in this case, any such action is maintainable at all where there is an arrest, and the party detained and kept in custody; it may be that an action might have been maintained showing that the company's servants had acted negligently or improperly in the matter; but where, as here, there was no arrest, I doubt whether, from the circumstances stated, any action will lie. However, the particulars here are framed evidently to avoid the act of Parliament, and try the action for malicious prosecution in the County Court prohibited by the act, and if we assist the plaintiff in his endeavours it would, in my judgment, be an evasion of the act of Parliament.

BRAMWELL, B.—I must say that I am not without much doubt in this matter. The plaintiff says "There may be a claim for loss of reputation, and so on, or for nothing but certain unnecessary and improper expenses I was put to by the acts of the defendants, which they are bound by law to repay me, and I have a right to sue in the County Court for the recovery of my money so paid." On the other hand, if we see on the face of the plaint, from the plaintiff's particulars of demand, that the action is in fact for malicious prosecution in substance, and some few items of damage recoverable in that form of action merely stated as an evasion of the true cause of action, then I agree with the court that the prohibition should remain.

WATSON, B.—I agree with the rest of the court that the order is right. This action is for malicious prosecution; the particulars are framed by way of evasion, so as not to show the claim to be for malicious prosecution; but we must look at the substance of the charge to see what it is. It is an attempt, in my opinion, to evade the act of Parliament. I think it comes within the exception of the County Courts Acts, that the prohibition is right, and the rule must be discharged.

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## COURT OF COMMON PLEAS.

May 27, 1857.

CHESTERTON v. BRAMLEY.

*Landlord and tenant—Damages for not quitting after notice.*

*A tenant who holds over after a notice to quit has expired, and after he has received notice from his landlord that the premises have been let to another, is liable in an action by the landlord for damages for the loss sustained by him in consequence of his being unable to perform the contract which he had entered into to deliver possession to the incoming tenant.*

*Quære, whether an action of assumpsit could be maintained on the implied promise to deliver up possession at the end of the term.*

**T**HIS was an appeal from the decision of the judge of the County Court of Leicestershire. The action was brought for not giving up premises which had been let by Chesterton, the plaintiff, to the defendant upon a tenancy from year to year at a rent of 35*l*. The premises were let in May 1855. At Midsummer of the same year the plaintiff gave the defendant notice to quit at the Christmas following, and relet the premises from the next Christmas to one Harcourt for 40*l*. a year. The defendant said he would not quit unless some arrangements were come to. The plaintiff then informed him that he had let the premises at an increased rent from Christmas. The defendant refused to quit, and possession was subsequently obtained by proceedings in the County Court. An action was brought by Harcourt against the plaintiff for not giving him possession at Christmas, and the plaintiff paid Harcourt his costs. The defendant subsequently paid 10*l*. to the plaintiff, who, in accepting it, guarded himself against being supposed to receive it as rent. The question was, what damages the plaintiff was entitled to; the learned judge of the County Court held that he was entitled to the loss he had sustained by reason of the defendant's refusal to give up possession, and, as a part of that, to the costs he had been put to by the action brought by Harcourt.

*Phipson*, for the appellant.—The plaintiff, in reletting the land before he had possession, took upon himself the risk of not getting possession. The real question is, what damages he is entitled to for not giving possession to Harcourt before the end of the next

quarter. Has he a right to increase the damages by reason of a contract made by himself with another person? The natural damage is the increased rent, and he is entitled to nothing more. [COCKBURN, C. J.—If your proposition were correct, no one would let premises until he had got possession.] No further damage is in contemplation: (*Hadley v. Baxendale*, 9 Exch.; *Fletcher v. Tayleur*, 17 C. B. 21.) In the latter case Jervis, C. J., and Willes, J., threw out a suggestion that the measure of damages should in all cases be the same as in the case of money. (He cited *Robinson v. Harman*, 1 Exch. 855.) The value of the thing is the criterion of the loss. The rule laid down in *Hadley v. Baxendale*, that what is in contemplation is to be the measure of damages, is defective. It ought to be what persons have expressly or impliedly contracted against. Suppose Harcourt had insisted upon the plaintiff paying him liquidated damages if he did not give him possession. (He referred to Maine on Damages, and to the case of *Archer v. Williams* therein cited.)

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*Mundell*, for the respondent.—The question is, whether the plaintiff is entitled to recover this as damages for mesne profits. *Dunn v. Large*, 2 Doug., does not precisely decide the point, but seems to imply it: (*Goodtitle v. Tombes*, 3 Wils. 121; *Sedgewick*, p. 123.) The defendant was aware of the letting to Harcourt, and his refusal to leave was wilful. If the rule in *Hadley v. Baxendale* is good as to contracts, the same may be applied here in tort. The defendant knew the consequences of his act.

COCKBURN, C. J.—I am of opinion that the decision of the County Court judge was right. I am very far from saying that he could recover any special damage which might arise from the special circumstances attending the contract with the incoming tenant; but here the landlord sustained damage by the act of the outgoing tenant when putting his land to its ordinary use. If the landlord is unable to fulfil his contract with the incoming tenant, he is liable to an action and to pay damages, and it is only the ordinary course of dealing to make such a contract, and the outgoing tenant must have understood that he would do so. There is also this additional circumstance, that the outgoing tenant was actually apprised of the existence of the contract to give possession, and was therefore perfectly aware of the inconvenience and liability to which he was exposing the landlord, and he may fairly therefore be charged with the consequences of his act.

CRESSWELL, J.—I am of the same opinion. This is an action of trespass for mesne profits, and the outgoing tenant had a notice of the reletting, and he, therefore, wilfully committed a wrong, which would of necessity expose the landlord to an action. The outgoing tenant would not be liable for any damage arising from any peculiarity in the contract, but only for the ordinary consequences of his act.

WILLIAMS, J.—I am of the same opinion. The sum of ten pounds paid to the landlord was not really rent, but a compensation for occupation only, and its being considered as rent was

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expressly guarded against. This may be considered, therefore, as an action of trespass for mesne profits, and the damages claimed are the fair result of the defendant's act. I do not wish to express any opinion that this action could not be maintained as on an implied contract to give up possession at the end of the term.

WILLES, J.—I do not agree that without an express contract an action of *assumpsit* would lie against the tenant for refusing to give up possession. A tenant holding over is not a trespasser; land is not like a chattel; the landlord may either continue the tenancy or enter. Before, however, saying decidedly that I differ from my brother Williams, I should like further time for consideration. Assuming this to be an action for trespass for mesne profits, the damages are the ordinary result of the state of things.

*Judgment for the plaintiff.*

## COURT OF QUEEN'S BENCH.

November 7, 1857.

REG. v. WM. WAKE.

*Quo warranto*—County Court clerk—Effect of death of one of two persons appointed jointly to execute the office of clerk under sect. 25 of 9 & 10 Vict. c. 95.

*When two persons are appointed under sect. 25 of 9 & 10 Vict. c. 95, to execute jointly the office of clerk, the death or removal of one does not oust the other; but the latter cannot act in his office until the vacancy is filled up.*

THIS was a demurrer to a replication to a plea to an information in the nature of a *quo warranto*, calling upon the defendant to show by what authority he exercised the office of registrar of the County Court of Derbyshire held at Chesterfield. It is unnecessary to set out the pleadings, upon which no question turned. The material facts were, that prior to the passing of the 9 & 10 Vict. c. 95, a local court had existed at Chesterfield, and that upon the abolition of that court and the substitution of a County Court, the judge, with the approbation of the Lord Chancellor, appointed the defendant and another gentleman, who had been clerks under the old local act, to execute jointly the office of clerk under the general act; that recently the defendant's co-clerk had died, and that upon his death the judge of the court, treating the office as vacated, had, with the approbation of the Lord Chancellor, appointed

another person alone to the office of clerk of the court (now called registrar under the last County Courts Act); and the question was, whether that appointment was valid.

*Hugh Hill, Q.C.* (*Overend, Q.C.*, and *Phipson* with him) for the defendant, contended that the appointment was bad. The stat. 9 & 10 Vict. c. 95, s. 25, though it used the words that two persons may be appointed "to execute jointly the office of clerk," yet clearly intended that the two should act separately, each being a complete clerk; because each was to be qualified as in the case of a single clerk, and regulations were to be made for the division of duties and emoluments. Further, each of these two, having had a distinct freehold office before, it could not have been intended to give them one joint office, which would cease whenever one died or resigned, or was removed from any cause. *Auditor Curle's case*, 11 Rep. 3 b, was consequently inapplicable; and that was also the case of a judicial officer, whereas that of the clerk of a County Court is purely ministerial: (*Dews v. Ryley*, 20 L. J. 264, C. P.) [Lord CAMPBELL, C. J.—Then must there be perpetual duality?] Yes; unless both should vacate their offices at the same time. *Morell v. Martin*, 6 Bing. N.C. 373, was also referred to.

*Lush, Q.C.* (*Brewer* with him) contra.—The words of sect. 25 must be construed with reference to the well-known state of the law at the time when it passed; and according to *Auditor Curle's case*, two persons appointed jointly to execute a judicial office, hold only one office, and their tenure ceases altogether when one of the two dies, resigns, or is removed. Further, the language of the statute throughout leads to the same construction; because everywhere the office of clerk is mentioned in the singular number; and though there may be two persons, there can be only one County Court office, and one set of books. In sect. 11, where the intention was to make them separate and distinct offices, the word "clerks" is to be found; and sect. 19 of 15 & 16 Vict. c. 54, with respect to the clerks of the Bristol court, also favours the argument for the relator. He also referred to 20 & 21 Vict. c. 77, s. 17. [Lord CAMPBELL, C. J.—How do you distinguish this from the case of the sheriff of London, which is an office executed by two persons; yet if one dies, the other is not ousted of his office, though his power is suspended until a companion be chosen to him?] The ground upon which the case of the sheriff is put is, that he is a purely ministerial officer. [Lord CAMPBELL, C. J.—The sheriff certainly has judicial functions.] That, however, is the ground upon which the distinction is rested, and it does not apply to the clerk of a County Court who, like the masters of the superior courts, has the taxation of costs and other judicial functions to discharge. [ERLE, J.—I think the taxation of costs is the act of the court.] At all events, the later County Court Acts throw that duty upon the clerk or registrar independently of the judge. He also referred to 18 & 19 Vict. c. 67; Bac. Abr. tit. "Office," K.; *Jones v. Pugh*, 2 Salk. 465.

Lord CAMPBELL, C. J.—It is satisfactory to me to find that

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one of two  
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this *quo warranto* cannot be supported, and that our judgment must be for the defendant. It is allowed that if the clerk of a County Court is a ministerial officer only, the death of one, when two are appointed under sect. 25, would not destroy the tenure of the other; and the strong inclination of my opinion is, that he is a purely ministerial officer. All the duties which by express enactment are cast upon him are of that nature, and when he acts in taxing costs, he is not a judge, but a mere assessor, and his taxation is subject to revision. But if he be a judicial officer, I am still of opinion that this *quo warranto* cannot be supported. We must look to see what was the intention of the Legislature as expressed in sect. 25; and if the intention was that the two clerks should both hold the office severally during the good behaviour of each respectively, that is the tenure by which they did hold the office; and in my opinion that was the intention of the Legislature in that enactment. I do not think that it was the intention that upon the death of one the whole office should pass to the survivor, but that the survivor should continue in his own office, though his power of acting would be suspended until a companion should be appointed for him. It is clear that when a single clerk is appointed, he is to hold during good behaviour; can it be supposed that when two are appointed, who are to act separately, and who are to divide between them the duties and emoluments of the office under the regulation of the court, that in that case the intention was that each should hold not merely during the life of the other, but that he should be liable to be ousted at any time by the resignation or removal for misconduct of the other? I do not believe that it was the intention of the Legislature to commit so great an injustice and absurdity. I think, therefore, that the appointment of a sole clerk, the defendant still surviving, is a void appointment; and I have no doubt that in compliance with our decision an appointment will forthwith be made of a joint clerk to act with the defendant. The analogy between this case and that of the sheriff of London is exceedingly strong; because no doubt the sheriff is a judicial officer; and it has long been decided that, if one of the two persons filling that office dies, the other is not thereby put out of the office, but he cannot act till a companion is appointed to him. That analogy strongly fortifies our decision in this case.

COLERIDGE, J.—It is not necessary for us now to decide whether this office is ministerial or judicial, or partly ministerial and partly judicial—still less is it necessary to dispute the general principle of law as laid down in *Auditor Curle's* case. Here the case supposed in sect. 25 is that of a populous district where the services of more than one clerk are required, and where, two being appointed, there is to be a division of duties and emoluments between them. It is assumed, therefore, that they are to act separately; and it is not necessary that the two should concur in any one act. The latter part of the section which provides that the same number of clerks should be continued as there had been under any local act previously existing, shows also that too much

reliance must not be placed on the use of the words "appointed to execute jointly the office of clerk." Then see how wide the distinction is between this case and *Auditor Curle's* case. The words of the stat. 32 Hen. 8, c. 46, on which that turned, were, that the two persons should be called "the fourth officer of the same court;" and the words of the second resolution, on which reliance is placed, are, "And in this case no survivor can be: for inasmuch as it is enacted by the act of Parliament by which this new court was erected, that there shall be two persons, &c. who have (as is aforesaid) a judicial voice, the King can't constitute one only, for the subject by the act has interest in it, *et securius expediuntur negotia commissa pluribus*." There is still another distinction pointed out in the note of the editor, which is, that that office could not be executed by deputy; whereas sect. 26 of the County Court Act empowers the clerk so to act. Looking indeed at all the provisions, I have no doubt that the two persons were meant to be two separate officers, each holding separately during good behaviour, and not during the good behaviour of the other, or at the will of the other, as has been contended.

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WIGHTMAN, J.—I think that the Legislature has treated this as a ministerial office. All the duties appointed by sect. 27 are ministerial; and as to taxation of costs, he seems originally to have acted only as assistant to the judge, who, by sect. 88, is to decide how costs are to be paid and apportioned. Subsequent statutes may have empowered him to tax *proprio vigore*; but the question is, what was contemplated by the Legislature when the first act passed. It seems to me that the Legislature regarded the clerk as a ministerial officer; and if so, the analogy of the sheriff is admitted to be applicable.

ERLE, J.—I also think that there is no resemblance between the judicial functions to be performed jointly by two in *Auditor Curle's* case, and the functions to be separately performed by the two persons appointed under sect. 25 of the County Court Act to execute the office of clerk. If two are to judge jointly, it is, of course, essential that they should act together. If two arbitrators are appointed and one dies, it is *lucē clarius* that the appointment of the other is void; but there is no analogy between such a case and the present. The whole tenor of the enactment here is, that they shall in a manner act separately; each is to be virtually a clerk for the department he may take in the particular district; and the division of duties and emoluments is to be under the regulation of the court. The analogy relied upon therefore fails; and, in my opinion, in this case the death of one of the two jointly appointed did not *ipso facto* oust the other, but he still continues in his office.

*Judgment for defendant.*

## COURT OF QUEEN'S BENCH.

November 24, 1857.

WATERLOW AND OTHERS v. DOBSON.

*County Courts Acts—Costs—Concurrent jurisdiction—Metropolitan districts—Sect. 18 of 19 & 20 Vict. c. 108.*

*Sect. 18 of 19 & 20 Vict. c. 108 (which entitles a plaintiff who resides or carries on business in any of the Metropolitan County Courts districts to sue his debtors who reside or carry on business in any of the said districts, either in the district where he himself dwells or carries on his business, or in that where the debtor dwells or carries on his business) does not affect the 128th section of 9 & 10 Vict. c. 95, giving concurrent jurisdiction to the Superior Courts where the plaintiff resides more than twenty miles from the defendant.*

A RULE had been obtained, calling on the defendant to show cause why the plaintiff should not have his costs, although he had recovered less than 20*l*. The affidavits disclosed that one of the plaintiffs (who were partners) resided more than twenty miles from the defendant; but that both the plaintiffs and the defendant carried on business within the district of a metropolitan County Court, the former within that of the Westminster, the latter within that of the Whitechapel County Court.

*Petersdorff* now showed cause, and admitting that this was a case of concurrent jurisdiction under sect. 128 of 9 & 10 Vict. c. 95, contended that the effect of sect. 18 of the recent stat. 19 & 20 Vict. c. 108, was to exclude from the former enactment all cases in which plaintiff and defendant resided or carried on business within any of the districts of the metropolitan courts.

ERLE, J.—That section has nothing to do with the question of costs in the superior court. The purpose of the enactment obviously is that a tradesman, who has various debtors in different metropolitan districts, may sue them all in one court. It does not interfere with any other rights.

COLERIDGE, J.—If he chooses to sue in the County Court, he may sue in the court of the district where he dwells or carries on his business, or in that where his debtor dwells or carries on his business. It gives the plaintiff an option.

*Petersdorff*.—It is submitted that “may” is to be read “must.”

COLERIDGE, J.—Then you make it a restraining clause instead of an enlarging one.

*H. James*, contra, was not called upon.



Lord CAMPBELL, C. J.—We are all of opinion that this is a case of concurrent jurisdiction under sect. 128 of 9 & 10 Vict. c. 95, and that that clause is not in the slightest degree affected by the recent enactment respecting the metropolitan districts.

ERLE, J.—The enactment is clearly framed to carry into practice the effect I speak of, and it cannot have the effect for which Mr. Petersdorff contends, without altering the words, for which there seems no reason.

*Rule absolute.*

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OTHERS  
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—

## COURT OF EXCHEQUER.

November 25, 1857.

MASSEY v. BURTON.

*Districts in metropolis—County Courts Amendment Act, 19 & 20 Vict. c. 108, s. 18.*

*Plaintiff and defendant lived within the Marylebone County Court district, where the cause of action arose. A summons being issued by plaintiff against defendant from the Bloomsbury County Court district, it was dismissed by the judge. On the following day plaintiff took lodgings within the Bloomsbury County Court district, and caused a second summons to be issued from that court against defendant the next day. Plaintiff resided there continuously and nowhere else. The County Court judge decided, upon the objection being taken that he had no jurisdiction, as the plaintiff did not reside in the district, the taking of the lodging being merely colourable, that such residence was sufficient, and he heard the case :*

*Held, by this court, that he was right, and that he had jurisdiction.*

**T**HIS was a rule for a writ of prohibition to issue to the judge of the Bloomsbury County Court of Middlesex, prohibiting further proceedings in the action. The plaintiff, in the first instance, caused a summons to be issued against the defendant from the Bloomsbury County Court, but as the parties resided, and the cause of action arose, within the district of the Marylebone County Court, the Bloomsbury County Court judge, on hearing the objection, dismissed the summons. The plaintiff, the next day, took lodgings at No. 4, Rochester-terrace, Camden-town, which is within the jurisdiction of the Bloomsbury County Court, and then at once caused (September 22) another summons to be issued from the Bloomsbury County Court against the defendant for money had and received, and for goods detained by him belonging to the plaintiff, &c. This came on to be heard in court

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metropolis—  
Residence of  
plaintiff.*

on the 28th October, when the defendant, by counsel, objected to the jurisdiction upon the same ground as that taken on the previous summons, that the plaintiff did not reside within the jurisdiction. It appeared, however, that she actually resided at 4, Rochester-terrace, had paid rent weekly, and produced five receipts for her rent. In this she was confirmed by her landlord there, and the County Court judge determined she resided within the district, and that this second summons properly issued. The defendant, who had obtained a jury, then proceeded with the cause: it continued some five hours, and resulted in a verdict for the plaintiff. The defendant having obtained this rule for a prohibition,

*Hawkins* showed cause.—This rule is obtained on the ground that, at the time the second summons was issued, the plaintiff did not reside within the jurisdiction of the Bloomsbury County Court, so as to be entitled to bring her action there within the meaning of the 19 & 20 Vict. c. 108, s. 18, which provides that, where a plaintiff shall dwell, &c. in the district of the County Court of Middlesex, or in, &c. (the district of the other metropolitan courts), and the defendant shall dwell or carry on business in the district of any of the said courts, the summons may ~~issue~~ and be served either in the district in which the plaintiff shall dwell or carry on business, or in the district in which the defendant shall dwell or carry on business. The plaintiff, in fact, ~~did~~ reside at 4, Rochester-terrace, admitted to be within the Bloomsbury County Court district, when this summons was taken out: her having been there but a very short time makes no difference: she had a right to remove where she pleased; she has remained there ever since, and has resided nowhere else, and she is confirmed in this by her landlord. The County Court judge so decided at the trial; but the defendant, who obtained the jury, went on with the cause, took his chance of obtaining the verdict, and, having done so and lost it, now comes to the court for a prohibition on the same excuse argued at the trial; so that there are two answers to this application; one is, that it is too late upon the grounds stated, and judgment being signed; and the other is, that the plaintiff did reside within the district in which the summons issued at the time it issued, within the meaning of the act of Parliament. [BRAMWELL, B.—You have not referred to *R. v. Hughes*, in the present number of the L. J. Mag. Cas. 133, which strongly supports your view.]

*W. Lewis*, contra, in support of the rule.—Looking at the object of the previous County Court Acts, and also the 19 & 20 Vict. c. 108, the question is, whether a plaintiff who merely goes for the express purpose of being within a particular district of a metropolitan County Court can hire a lodging, and then a day or so after cause a summons to be issued in that district, on the ground that such plaintiff lives within the district. [MARTIN, B.—Why not?] The *bona fides* of the matter should be looked at: here the residence was merely colourable, and for no other purpose than to

bring this action. [POLLOCK, C. B.—Where do you say the plaintiff does reside, if not where she swears she does?] The defendant does not know; but when the lodging is taken merely to get into a particular district, it is colourable only, not in accordance with the object of the act, enabling a plaintiff to sue as to the metropolitan County Court, in the district in which he resides.

POLLOCK, C. B.—I am of opinion this rule should be discharged. The defendant first takes the opinion of the learned County Court judge upon the point, who decides, and rightly decides, the summons was properly issued from the Bloomsbury district, as the plaintiff, from the evidence before him, resided within the district of that court. Having failed in this, he goes to the jury upon the facts, and there it appears he failed also, the verdict being for the plaintiff. The defendant now comes to this court for a prohibition; but as the plaintiff did reside within the district when the summons issued, and has remained there ever since, how can we say the summons improperly issued in that district? I think it did not, and the learned County Court judge so decided; he was right, and the rule must be discharged with costs.

MARTIN, B.—I am also of the same opinion. There is no reason, that I know, why a person may not come to reside within a particular district of the metropolitan County Courts, for the express purpose of bringing an action in that district of the County Court. The act of Parliament gives plaintiff the right of suing a party in the district of the metropolitan County Court in which such plaintiff resides, if the defendant dwells or carries on his business within the district County Courts of the metropolis. Here the plaintiff removed into the district of the Bloomsbury County Court, before issuing the summons, as she had the right if she pleased to do.

BRAMWELL and CHANNELL, BB., concurred.

*Rule discharged.*

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v.  
BURTON.

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*Districts in  
metropolis—  
Residence of  
plaintiff.*

## COURT OF QUEEN'S BENCH.

November 3 and 25, 1857.

REG. v. DOWLING (SERJ.)

*Insolvency—Creditor's petition—Duty of County Court to adjudge. A County Court judge, to whom a petition and schedule in insolvency are referred by the Insolvent Debtors Court, is bound to hear and adjudicate upon the same, notwithstanding the petition is not that of the insolvent, but of one of his creditors.*

**T**HIS was a rule calling upon the judge of the County Court holden at York, to show cause why a mandamus should not issue, commanding him to adjudicate upon a petition and schedule transmitted to him by the Insolvent Debtors Court in London, concerning one James Greenwood, an insolvent debtor.

*Knowles, Q.C. (Raymond with him), showed cause.*

*MacOubrey* in support of the rule.

The following statutes and cases were cited in the argument:—1 & 2 Vict. c. 110, ss. 23, 31, 32, 36, 37, 95, 106; 10 & 11 Vict. c. 102, ss. 4, 6; *Re Charles Race*, 27 L. T. Rep. 83; *Ex parte Phillips*, 2 Ell. & Bl.

The facts and arguments sufficiently appear in the following judgment.

*Cur. adv. vult.*

## JUDGMENT.

November 25.—Lord CAMPBELL, C.J.—This was a rule calling on the judge of the County Court of York to hear an insolvent named Greenwood upon an order of reference from the court of London. Greenwood was committed to York Castle in February 1856, in execution for a debt, and removed to the Queen's Prison by *habeas corpus*. In October a creditor petitioned for a vesting order, which was issued: thereupon Greenwood filed his schedule. An order for hearing in London was made, and on the hearing he was ordered to be taken back to York. An order of reference to the judge of the County Court was made, which he has refused to obey. The question is thus raised, whether the court in London has jurisdiction to make an order of reference to a judge of a County Court in the matter of an insolvent where the proceeding in insolvency originated in a petition by a creditor for a vesting order. By the 10 & 11 Vict. c. 102, s. 10, it is enacted that the circuits of the commissioners shall be abolished after the 15th

September 1847, and "that if thereafter any insolvent debtor shall petition the court for relief, or if any insolvent debtor shall have so petitioned, such court shall forthwith, after the schedule of such petitioner shall have been filed in the case of a new petition, or at any time which shall be thought fit in case of a petition theretofore presented, make an order referring such petition to a judge of a County Court." These words, taken literally, apply to petitions presented by a creditor against the insolvent. But considering the purpose of this act, and the context, together with the 1 & 2 Vict. c. 110, we think that the intention of the Legislature to give jurisdiction in respect of creditors' petitions as well as insolvent petitions, sufficiently appears. The purpose of this act is to transfer, not to abolish, jurisdiction; the functions that were performed long before by the commissioners in bankruptcy and commissioners in insolvency on circuit, are in future to be performed by the County Court judges. Thus, by sect. 4, all powers, &c. given to the Court of Bankruptcy in matters of insolvency by the Protection Act shall be transferred to the Court for Relief of Insolvent Debtors, and the judges of the County Court; and by sect. 6 the limits of the jurisdiction of the London court, and the County Courts respectively, are fixed; under these sections the transfer of all powers is complete as far as relates to the Protection Acts. Sect. 10 relates to the transfer of the powers theretofore vested in the commissioner in insolvency on circuit, under the 1 & 2 Vict. c. 110, to the County Court judges. The context shows that the transfer in this case was intended to be as complete as in the case before mentioned, but it was thought necessary to make a different provision for the petitions that should be presented after this act came in force, and those which had been presented before. The introductory hypothesis of an insolvent debtor presenting a petition after, or having presented one before, the act passed, is mentioned for the purpose of dividing petitions into new and old, not for the purpose of dividing petitions by insolvents from petitions by creditors. If the words of the section are confined to their literal meaning, the result would be, that under a creditor's petition a vesting order might be made depriving a debtor of all his property, and all means of paying his debts; but no relief from imprisonment could be given which involves the absurdity of supposing the Legislature intended to act unjustly. The language of the statute is remarkably inaccurate; the 10th section speaks of hearing the petition, whereas the 1 & 2 Vict. c. 110, provides for a hearing on the schedule, and there can be no hearing in the sense intended by the 10th section till after the schedule is filed, and the power to order gaolers to bring up debtors for hearing before the London court, or the County Courts, as the case might be, is in words a power to bring debtors before the County Court only. Inaccuracy of language in a statute is a ground for assuming that the literal meaning, if leading to an absurdity, does not express the intention of the Legislature, and requires the court to seek another meaning not inconsistent with

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—  
*Insolvency—  
Creditor's  
petition—  
Duty of  
County Court to  
arbitrate.*

the language used from the context and purpose of the act; and for the purpose of the Legislature in this section it is immaterial whether the insolvent or the creditor has petitioned; the time of proceeding is alone material, and though the example is put "if an insolvent petitions," the meaning is, "if a petition is presented." This construction is fortified by referring to the 1 & 2 Vict. c. 110, s. 36, creating the power for creditors to petition for vesting orders; if the vesting order is made thereon against an insolvent, the enactment is, that a further order shall then be made for the insolvent to file a schedule thereon, and then he is to be brought up for hearing, "and all things are to be done thereupon or preparatory thereto, as in other cases, according to this act." That is as in case of petitions by insolvents, the act provides for hearing the insolvent after a schedule has been filed on his own petition, and then provides for a creditors petition, and if the insolvent files a schedule thereon, the procedure for a hearing thereon is to be the same as in the case of insolvents' petition. The 1 & 2 Vict. c. 110, and the 9 & 10 Vict. c. 102, are to be read together. It is clearly necessary to take powers under the 1 & 2 Vict. c. 110, to enable the London court to order a gaoler to bring a prisoner up in London under the 9 & 10 Vict. c. 102, and we see no reason why the London court should not take powers from sect. 36 to do all things relating to a hearing after a creditor's petition, which it is authorised by either act to do for a hearing on an insolvent's petition. The 10th section has been repeatedly under consideration in the Court for the Relief of Insolvent Debtors, and in *Re Charles Race*, the Chief Commissioner has given a clear and powerful judgment, deciding that an order of reference may be made for the hearing of insolvents who have filed schedules after a creditor has petitioned for and obtained a vesting order. With that judgment we concur, and we think that an order of reference may be made to a judge of a County Court as was done in this case. It follows that the rule should be made absolute.

*Rule absolute.*

## COURT OF EXCHEQUER.

*January 19, 1858.*

VALLANCE v. NASH.

*Courts Acts Amendment Act, 19 & 20 Vict. c. 108, s. 68—  
Interpleader—Appeal.**the amount claimed is under 20l. yet if the value of the goods or  
chattels seized or of the proceeds thereof exceeds 20l., the parties have  
the right of appeal from the decision of a County Court judge in pro-  
ceedings in interpleader under the 19 & 20 Vict. c. 108, s. 68, the  
County Courts Acts Amendment Act 1856.*

S was an action in the County Court of Sussex for a sum under 20*l.*, that is to say 10*l.* only; judgment being recovered for that sum, goods were seized of the value of 34*l.* to satisfy it; party having claimed those goods, an interpleader application was heard by the County Court judge, who decided in favour of the execution-creditor. The claimant being desirous of appealing to the County Court under the 19 & 20 Vict. c. 108 (the County Courts Acts Amendment Act), the judge of the County Court thought, as the amount claimed was under 20*l.*, it was doubtful whether there was an appeal under that statute. Sect. 68 enacts that "an appeal from the decision of a County Court on the same grounds and on the same conditions as are provided by the fourteenth section of the act of the thirteenth and fourteenth years of the reign of her present Majesty, chapter sixty-one, shall be allowed in all actions of replevin where the amount of rent or damages exceeds twenty pounds, and in all actions for the recovery of rents where the yearly rent or value of the premises exceeds twenty pounds, and in proceedings in interpleader where the money claimed, or the value of the goods or chattels claimed or of the proceeds thereof, exceeds twenty pounds, and in all actions where the parties agree that the court shall have jurisdiction."

The *nisi* having been obtained calling upon the County Court to approve and sign the case for an appeal to this court.

The defendant appeared on behalf of the learned County Court judge, and, urged, upon the words of the above section, the sum claimed was under 20*l.*, that an appeal did not lie, although the value of the goods seized amounted to more than 20*l.* The dispute was

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between the claimant and the execution-debtor. The learned judge would readily sign the case, if the court should intimate their opinion an appeal would lie under the act of Parliament. [MARTIN, B.—Suppose for a debt of 15*l.* the execution-creditor, through the bailiff or officer of the court, seize a picture of 100*l.* value, surely an appeal may be had under this act of Parliament.]

*Spinks*, for the execution-creditor, was proceeding to enter into the merits of the case to show that, even if an appeal were allowed, the claimant was not entitled. He referred to *The East Anglian Railway Company v. Lythgoe*, 20 L. J. 84, C. P., where it was held that the court above would not review the judgment of the County Court on a question of fact, or if the judgment given by him were right, considering whether the reasons he assigned for it were valid in law, and Maule, J., appeared to doubt whether an appeal would lie from a decision of a County Court, except in cases in which a jury has been summoned to decide on the facts. He also referred to *Cowley v. Furnell and another*, ib. 197.

POLLOCK, C. B.—We need not discuss that now; the only question at present is, whether an appeal lies under this recent statute, the goods seized being of more than 20*l.* value, and we are all clearly of opinion that there is a perfect right to appeal.

*C. Pollock*, in support of the rule, not heard.

*Rule absolute.*



## COURT OF QUEEN'S BENCH.

January 20, 1858.

*Ex parte* W. H. MUNRO.

Insolvent debtor—County Court—Mandamus to hear petition—As to  
 limiting jurisdiction—As to power to adjourn the hearing *sine die*—  
 2 Vict. c. 110, s. 72.

*It appears that the petition to the Insolvent Court is presented in  
 order to frustrate the control of the Commissioner in Bankruptcy, that  
 it affords a ground for dismissal of the petition in the Insolvent  
 Court.*

*Rule nisi* to the judge of the County Court at Nottingham to  
 appoint a day to hear and adjudicate upon the petition of  
 William Horace Munro, an insolvent debtor.

It appeared that Munro having been adjudicated a bankrupt,  
 in default of surrendering on the day named for his surrender,  
 was, as alleged, to the delay of the railway train. The Com-  
 missioner in Bankruptcy refused leave to surrender subsequently  
 on payment of the costs incurred by the default, 17*l.* 10*s.*  
 He was afterwards arrested for the costs, and petitioned the  
 County Court at Notts under the Insolvent Debtors Act, and he  
 appeared at the hearing, and the facts of the bankruptcy pro-  
 ceedings brought to the notice of the court, and ultimately the  
 hearing of the insolvent was adjourned *sine die*.

November 25.

*William* showed cause, and *Merewether* supported the rule.

*Cur. adv. vult.*

MR. CAMPBELL, C. J.—This was a rule *nisi* calling upon the  
 judge of a County Court to show cause why he should not hear,  
 determine and adjudicate in the matter of the petition and schedule  
 of the applicant. The rule is founded on the assumption that the  
 judge of an inferior tribunal has declined a jurisdiction vested in  
 him by law. If he has exercised a jurisdiction, and if he has heard  
 the matter determined and adjudicated, the rule must be discharged  
 whether we assent to this adjudication or not. It appears by the  
 facts that the judge, instead of declining the jurisdiction, has  
 repeated hearings of the applicant, and has, on an earlier  
 day, adjudged that the matter should be adjourned to a future  
 day named in the adjudication, and at the last hearing adjudged

L. III.

R

*Ex parte*  
W. H. Mayo.

1884.

*Mandamus—*  
*Jurisdiction—*  
*Adjournment.*

that the further hearing should be adjourned *sine die*, with leave to the applicant to come up again on giving ten days' notice. This adjudication was made after much consideration of the liability of the applicant as a bankrupt to the jurisdiction of the Commissioner of Bankruptcy, and of the duties of the Commissioner in Insolvency in respect of the same bankruptcy. The assumption, therefore, on which the rule was founded is disproved. The statute gives an unlimited power to adjudicate that the further hearing should be adjourned according to the discretion of the commissioner. The words of 1 & 2 Vict. c. 110, s. 72, relating to adjournments *sine die*, are, "in case the said court shall entertain any doubt touching any matter alleged against any person at such hearing to prevent the discharge, or otherwise touching the schedule or the examination of such prisoner, it shall be lawful for the said court to adjourn the hearing and examination of the said prisoner to some future sitting of the said court." There is a proviso "where any such hearing shall be adjourned by the said court generally, the said court may, on application of the said prisoner to be made within such time as the said court shall direct, order the said prisoner to be brought up for hearing accordingly, and such notice shall be given as the said court shall direct." We consider that these words give power to adjourn to some future court day to be ascertained, of which notice should be given; and even if the adjudication of adjournment *sine die*, with liberty to apply again, was not authorised by the statute, it would be an informal or erroneous judgment, but not a declining of jurisdiction, and no ground for the present motion. It is not within our province to express either an assent to or dissent from the decision of the judge in exercising the power of adjournment, or judgment on any future occasion; but we may add, that the expediency of allowing a bankrupt to frustrate the control of a judge in bankruptcy, by resorting to a judge in insolvency, might afford ground for dismissing the petition, if the judge thought fit; and although the argument in the present case was, in form, against the jurisdiction of the Commissioner in Insolvency, and the judgment was an adjournment *sine die*, the substance of the matter is, that the petition is in effect dismissed, on the ground contended for by the opposing creditor. Therefore the rule will be discharged, but without costs.

*Rule discharged.*

## COURT OF QUEEN'S BENCH.

April 22, 1858.

POWER v. STRINGER.

*Appeal—Sureties—Time of putting in.*

*Upon an appeal against the decision of a County Court, the appellant gave security by two sureties in due time. Afterwards he found that, as they were practising attorneys, they were disqualified, whereupon he applied to the County Court judge to be permitted to substitute fresh sureties, which was granted, and they were accordingly put in, but after the time limited by the rule for so doing :*

*Held, that the proceedings were regular.*

GRAY moved for a rule to strike out this appeal from the paper under the following circumstances:—

This case was tried before the judge of a County Court on the 10th November last. Within due time the appellant gave notice of appeal, and gave security with two sureties. After the time had elapsed he discovered his two sureties were disqualified, inasmuch as they were practising attorneys. He therefore applied to the County Court judge to substitute other sureties, to which he assented. It was now contended that, as the present sureties were not given in time, the appeal became abortive, for that the County Court judge had no power to take sureties after the proper time had elapsed. [ERLE, J.—The sureties were approved of by the clerk of the court in the first instance. The new sureties were merely put in *nunc pro tunc*. Suppose one of the sureties dies, could no other be substituted?]

Lord CAMPBELL, C. J.—There is no objection to the course that has been taken.

*Rule refused.*

## COURT OF QUEEN'S BENCH.

*April 23, 1858,*

CARR v. STRINGER.

*Appeal from taxation of costs—13 & 14 Vict. c. 61, s. 14.**There is no appeal to a superior court from an improper taxation of costs on the higher scale in a County Court.**The court, however, intimated their opinion that when a plaintiff in a County Court claims more, but recovers less, than 20*l.*, the costs ought to be taxed not on the higher but the lower scale.*

**T**HIS was an appeal from the County Court of Yorkshire, holden at Wakefield, in respect of the judge having allowed costs to the plaintiff on the higher scale. In the action, which was for pulling up and carrying away certain trees of the plaintiff, and for cutting the roots of and damaging other trees, the plaintiff claimed 25*l.*, but the jury awarded only 15*l.*, as damages. The judge allowed the costs to be taxed on the higher scale, more than 20*l.* having been claimed; and from this allowance the defendant appealed, contending that, as less than that amount had been recovered, the taxation ought to have been on the lower scale.

*Manisty*, for the appellant, submitted that the taxation was wrong; and that there was an appeal to the superior court under the 13 & 14 Vict. c. 61, s. 14.

*Gray*, for the respondent.

Lord CAMPBELL, C. J., said that, although the court were of opinion that the costs ought to have been on the lower scale, the matter could not come before them, as they had no jurisdiction.

WIGHTMAN, ERLE and CROMPTON, JJ. concurred.

*Appeal disallowed with costs.*

## COURT OF COMMON PLEAS.

*February 12, 1858.*

WARNER v. REDDIFER.

*County Court appeal—Signature of case by the judge—Practice—  
13 & 14 Vict. c. 61, s. 15—Rules of practice in County Courts under  
12 & 13 Vict. c. 101—Rule 162—Conflict of the statute and rules.*

*After the hearing of a plaint in the County Court the attorneys on both sides agreed in the statement of a case by way of appeal to the court above, and submitted it to the County Court judge for his signature. He signed the case, and added thereto some remarks of his own upon it :  
Held, that the judge's duty was confined to the signing of the case ; and the court, therefore, could not look at the remarks he had appended.*

**T**HIS was an appeal from the judgment of a County Court judge in an action of assault and false imprisonment. Several points were raised in the argument, which presented no feature for a report, with the exception of the following point of practice :—It appears that, on the conclusion of the case in the court below, the attorneys on both sides having assented to an appeal, they mutually agreed in the statement of a case for the opinion of this court, and presented it for the signature of the County Court judge. He signed the case, but added to it, by way of appendix, some remarks of his own, qualifying the statements in the case, of which the parties had then no cognisance.

*Kingdon* for the appellants.—In considering the questions here raised, the court should not look at the remarks appended by the County Court judge when he signed the case. The 13 & 14 Vict. c. 61, s. 15, says, "such appeal shall be in the form of a case, agreed on by both parties or their attorneys; and if they cannot agree, the judge of the County Court, upon being applied to by them or their attorneys, shall settle the case and sign it," &c. This certainly shows that the judge need not sign, except when parties differ. The rules of practice, made under 12 & 13 Vict. c. 101, s. 12, direct by rule 162, that "all cases shall be signed by the judge, and shall be presented to him for signature, unless he shall otherwise order, at the court, after twelve clear days from the giving such determination or direction, and shall be sealed with the seal of the court," &c. [WILLES, J.—The rule looks like a void rule, as conflicting with the statute. CROWDER, J.—Have

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remarks.

you looked through the most recent statute; for one would suppose the discrepancy between the rule and the statute must have been perceived?] Nothing is to be found in the 19 & 20 Vict. c. 108, relating to it.

*Gray* for the respondent.—The act of Parliament says the appeal is to be in the shape of a case, settled between the parties, and that if they differ, the judge is to settle and sign the case. The meaning is, in substance, that the judge is the party to settle or state the case for the court. [WILLIAMS, J.—The parties, if they agree upon the case, can take it up to the court above, not only without the signature of the judge, but without regarding him.]

*Kingdon* in reply.—If the parties choose to agree, the judge is bound to sign, and what he does beyond that is mere surplusage.

WILLIAMS, J.—A point of no little importance is involved, and has been raised in this case, which is, how far the court can look at a protest or appendix which, on signing the case, a judge of a County Court may think fit to add to it. Looking at the act of Parliament, it is difficult to avoid coming to the conclusion that, when the attorneys on both sides agree, and certify their assent, the judge is bound to sign the case. Here he has signed the case, and, furthermore, has added a sort of protest. I think that, having signed the case, his duty ended there; and we are consequently not at liberty to look at the protest or appendix which he has added.

CROWDER, J.—As to the supplement or appendix added to the case by the judge when he signed it, I am of opinion we cannot look at it. Where the parties have agreed in the statement of a case for the court above, all that remains to be done under the statute, is for the County Court judge to sign it, and thus simply to authenticate the document which is to come before us.

WILLIAMS and BYLES, JJ., gave judgment on the other questions, expressing no opinion on the point of practice here raised.

## COURT OF EXCHEQUER.

May 7, 1858.

FURBER v. STURMEY.

*County Court—Appeal case in interpleader—County Court judge refusing to sign case—Attachment.*

*A judgment in an interpleader suit had been given in a County Court, against which it was proposed to appeal. Several months elapsed after the hearing, before the parties settled the case between themselves for the appeal. The case was then submitted to the County Court judge for him to sign; he refused, saying, "The decision of the question of this interpleader rested solely on the total absence of legal evidence on behalf of the claimant; it would be impossible, therefore, with every desire to relieve those who by delay, have lost the power of appeal, to sign the case, even where the lapse of time not a fatal objection." A summons was then obtained pursuant to the 19 & 20 Vict. c. 108, s. 43, calling upon the County Court judge to show cause why he would not sign the case; he did not attend the summons, and an order was made requiring him to sign the case. This he disobeyed:*

*Held, that an attachment should issue. Objections that the affidavits were not sworn until the day after the summons was obtained, and that the case was incorrectly stated by the parties, should have been relied on at the hearing of the summons, and did not affect the validity of the order.*

LUSH, Q.C. (*Griffiths* with him) showed cause against a rule obtained to set aside an order of Watson, B., which required the County Court judge of Clerkenwell to sign a case agreed upon by the attorneys of the respective parties in a cause heard before him in an interpleader suit. Notice of appeal was immediately given in the County Court, when the matter was there determined, and a case was drawn up which the other side received and kept over the long vacation; it was then returned with some alterations, which were agreed to, and the learned County Court judge was then applied to to sign it, but he refused, giving his refusal in writing. A summons was then taken out to show cause before Watson, B., why he refused. The County Court judge did not attend, nor did any person appear for him, and after hearing those who did appear, the above-named order was made. That order not being obeyed, a rule *nisi* had been obtained for an attachment

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against the County Court judge for disobedience to it. The 19 & 20 Vict. c. 108, s. 68, first gave power of appeal in cases of interpleader, and sect. 43 enacts that "no writ of *mandamus* shall henceforth issue to a judge or an officer of the County Court for refusing to do any act relating to the duties of his office; but any party requiring such acts to be done may apply to any superior court or a judge thereof, upon an affidavit of the facts, for a rule or summons, calling upon such judge or officer of a County Court, and also the party to be affected by such act, to show cause why such act should not be done; and if after the service of such rule or summons good cause shall not be shown, the superior court or judge thereof may by rule or order direct the act to be done, and the judge or officer of the County Court, upon being served with such rule or order, shall obey the same on pain of attachment, and in any event the superior court or the judge thereof may make such order with respect to costs as to such court or judge shall seem fit." The appeal is, by the 13 & 14 Vict. c. 61, s. 15, to be in the form of a case agreed on by both parties, but if they cannot agree the judge is to settle and sign it, and the appellant then to transmit it to the master's office of the court in which the appeal is to be brought. On the 2nd December a summons was obtained calling on the judge and the other side to show cause why the judge should not sign the case. The affidavits were not sworn until the following day (3rd); the summons was served on the 7th December. It was attended on the 8th and adjourned until the 11th December, when the order was made; it was served on the 14th, and the County Court judge having refused to obey it, the rule *nisi* for an attachment was obtained on the 14th January last. [POLLOCK, C.B.—Have the parties any right to agree to a case between themselves, and then to ask the County Court judge to sign it, or to compel him to do so? MARTIN, B.—Is the signature of the judge required at all? Just read the section of the act of Parliament.] Yes; the judge is to sign the case before it comes to this court. Rule 162 and the 145th rule were also referred to upon interpleader matters. The first application made to rescind Watson, B.'s order was on the 1st February. That is too late. The affidavits were not sworn until after the date of the summons, but that is immaterial; it is at most only an irregularity which has been clearly waived: it cannot be said the order is not good upon its face. The learned County Court judge should have attended before Watson, B., by himself or attorney or agent, and shown cause, if he really had any cause to show, against the order being made. He cannot now say that Watson, B., had no power to make the order, and yet he is driven to contend the order is void.

Borill, Q.C., Gaselee, Serjt., and Joseph Kaye, for the County Court judge, appeared to support the rule to set aside Watson B.'s order, and to show cause against the rule *nisi* obtained against the County Court judge for an attachment. The learned County Court judge has so far an interest in the matter as to see that the



parties do not abuse the powers and process of the court. The judge thinks one of the parties has no case in his court, and his decision was that there was no evidence to support the plaintiff's case. From the number of cases before them, it is also impossible to take notes of them all. Five months afterwards the case is sent to him to sign, and the case itself, as put before the County Court judge, is a perfect sham case. [BRAMWELL, B.—I have read the case, and so far from its being a sham case I should have difficulty myself in deciding it immediately. MARTIN, B., then read the case, and said it was a very fair case to be stated.] But it is not a true case, and the judge would have been guilty of a dereliction of his duty if he had signed a case for the court above untrue in substance and in fact. Again, five months elapse before the judge is asked to sign the case, even such a case as it is; by the 162nd rule, all cases are to be presented to him for signature, unless he shall otherwise order, at the court next after twelve clear days from the giving such determination or direction, and if the appellant does not comply with this rule, the successful party may proceed on the judgment unless the judge shall otherwise order. The County Court judge could not be leaving his duties to attend the judge's chambers upon any occasion he may be required by any of the suitors; nor could he send the registrar, who may refuse to go, he being an officer independent of the judge. There are conditions precedent that have not been complied with—giving security for costs within ten days, and making the proper affidavits before the summons was obtained. There is also a want of jurisdiction: (Dwarris on Stat. p. 641; *Smith v. Temperley*, 16 M. & W.; and *Figg v. Wilkinson*, 7 Exch. were mentioned.)

*Cur. adv. vult.*

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May 25.—POLLOCK, C.B., delivered judgment.—There were two rules pending in this case: one is for an attachment against a County Court judge for disobedience to an order of my brother Watson; the other is a rule to set aside my brother Watson's order. The facts of the case are these:—A judgment had been given by the learned County Court judge, against which it was proposed to appeal. A very considerable time was occupied in settling the case, which was one of interpleader; and ultimately it was submitted to the learned County Court judge to sign in the form in which it was returned as settled and agreed to by the successful party. The learned County Court judge refused to sign it, and wrote upon it a memorandum as follows: "The decision of the question of this interpleader rested solely on the total absence of legal evidence on behalf of the claimant. It would be impossible, therefore, with every desire to relieve those, who, by delay, have lost the power of appeal, to sign the case, even were the lapse of time not a fatal objection." A summons was taken out at chambers under the 43rd section of the statute 19 & 20 Vict. c. 108, calling upon the County Court judge and the proposed respondent to show cause why the case should not be signed: no affidavit or facts

summons  
a  
motion.  
1872.  
Judge Watson  
is the case  
attachment.

had been previously made. This summons was duly served upon, but was not attended by, the learned County Court judge, or any one on his behalf. The parties to the cause did attend; affidavits were made and used on both sides. No objection was taken that the affidavits had not been made before the summons issued, and my brother Watson made an order that the County Court judge should sign the appeal case, and cause the same to be sealed with the seal of the court. A case having been agreed on by the attorneys of both parties, and upon the facts then before my brother Watson, all of which appear in the affidavits which was used in showing cause against the rule, he had no alternative, but was clearly bound to make the order which he pronounced. He states that he was under the impression that all that was required was his order, and that the case would then be signed at once. The order was served on the learned County Court judge, but he refused to obey it, and in consequence a rule for an attachment—that being the course prescribed by the act of Parliament—was obtained. Cause was being shown against it last Hilary Term, when the counsel for the learned County Court judge applied for and obtained a rule to set aside my brother Watson's order, upon the ground that he had no jurisdiction to make it, no affidavit having been filed before the summons was granted, and the argument upon the rule for the attachment was postponed. Both sides were argued last term, and we have now to adjudicate upon them. The only substantial matter contended for before us was, that it was essential to give jurisdiction to my brother Watson that an affidavit of the facts should have been made before the summons issued, and it was argued that, upon the true construction of the section in question, the jurisdiction was conditional on such an affidavit having been made. We are all clearly of opinion that the jurisdiction is absolute, and that if the provision as to the affidavit extends to the case of a summons taken out at chambers, the circumstance of the affidavit not having been made was only an irregularity, and should have been relied on at the hearing of the summons, and does not at all affect the force and validity of my brother Watson's order. Even if the summons issued without an affidavit, there can be no doubt upon the hearing of the summons an affidavit was produced and the affidavit was filed before the order was made. It is proper, however, to state that the circumstance of such an affidavit not having been made before the summons, was not the reason why the learned County Court judge did not attend the summons, or direct any one to appear in his behalf or sign the case: in fact, he was not aware of the circumstance till some time after. The rule for setting aside the order must, therefore, be discharged; and as we all think, upon the facts before my brother Watson, it was imperative upon him to make it, and the rule has been drawn up with costs, and after an intimation from the court that it would probably fail, we think it must be discharged with costs. With respect to the other rule, the order of my brother Watson having

been duly made and not obeyed, the plaintiff is in strictness entitled to have the rule for the attachment made absolute, in order to compel obedience to my brother Watson's order, and it is too late for the County Court judge now to object that the case was incorrectly stated; but as the object of the attachment is to compel obedience to the order, and as it is not desirable that an incorrect case should be signed, and as we are informed by the County Court judge that the case is incorrectly stated, and we consider it is owing to a misapprehension that he did now show cause against the summons, we think that we are warranted in delaying giving judgment upon this rule till the end of the term. This will give an opportunity of going before a judge at chambers, if it be necessary, and having a proper case signed; and although the learned County Court judge did not seem to have taken a note—which probably is hardly possible where such a quantity of business is to be attended to and transacted—we hope there will be found no difficulty in ascertaining by the aid of the parties, if it should be necessary, the facts that were proved before him, so as to amend the case and put it in the form in which it ought to be signed. We think it right to add that we have the most sincere desire to treat the learned County Court judge with the utmost consideration and respect; but the superior courts of Westminster and the judges are not at liberty to decline a jurisdiction imposed upon them by the act of Parliament, or to do other than follow the course which is there prescribed. This jurisdiction was substituted for the former one by *mandamus*, which was costly and tedious. It is our duty to administer the law as it exists; and if the provision in question be objectionable as inconvenient and expensive, or in any other respect improper, it is for the Legislature and not for us to interfere to afford redress. One rule, therefore, will be discharged with costs: the other will stand over till the end of the term, in order that my brother Watson's order may be obeyed.

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*The rule to set aside Mr. Baron Watson's order discharged with costs. Rule for attachment to stand over until end of term, that Baron Watson's order may be obeyed.*

## COURT OF QUEEN'S BENCH.

June 1, 1858.

STONE AND ANOTHER v. DEAN.

*County Court appeal—Giving security—within what time.*

*The appellant in a County Court action gave notice of appeal within ten days, as required by section 14 of the 13 & 14 Vict. c. 61, but he did not give security for the costs until after that period. Upon a motion to strike the appeal out of the special paper :*

*Held, that the time limited in the above-mentioned section applied both to the giving of the notice of appeal and the giving of security ; and the appeal was accordingly struck out.*

**T**HIS was an appeal against the decision of the judge of the County Court of Derbyshire, holden at Wirksworth. By sect. 14 of the 13 & 14 Vict. c. 61, it is enacted that if either party shall be dissatisfied with the determination of the court in point of law, such party may appeal from the same to any of the superior courts of common law at Westminster, "provided that such party shall, within ten days after such determination or direction, give notice of such appeal to the other party or his attorney, and also give security, to be approved by the clerk of the court, for the costs of the appeal, whatever be the event of the appeal, &c."

The appellant gave his notice of appeal within the ten days, but he did not give his security until after that period, and upon the case being presented to the County Court judge for signature the objection was taken that the right of appeal was gone, inasmuch as the security had not been given within the ten days. The County Court judge, however, overruled this objection, and signed the case.

*Bullar* (upon the case coming on in its turn in the special paper) moved that it be struck out upon the objection before mentioned.

*Hayes*, Serjt., showed cause in the first instance, and contended that the objection was invalid, for that, although the 14th section of the 13 & 14 Vict. c. 61, requires the notice of appeal to be given within ten days, there is no express limitation with reference to the time of giving security, and that therefore it may be given at any time: (*Power v. Stringer*, 31 L. T. Rep. 81; *Daniels v.*

*Charsley*, 2 L. J. 37, C. P.; *Cannon v. Johnson*, 21 L. J. 164, Q. B.)

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LORD CAMPBELL, C. J.—We must decide against my brother Hayes. This appeal is regulated by the 14th section of the statute, and there can be no doubt that the ten days are intended to override the giving of the security as well as the giving of the notice of appeal. If not, there is in fact no time whatever for the giving of the security. The language is no doubt very general, but there is no inconvenience in holding that the security must be given within the ten days, whilst there would be the greatest inconvenience in holding the reverse.

COLERIDGE, ERLE and CROMPTON, JJ., concurred.

*Appeal struck out.*

## COURT OF EXCHEQUER.

June 8, 1858.

GOWENS v. MOORE.

*Costs—Action on a bond for 12l., penalty 20l.—County Courts Act.*

*Where an action was brought in the superior court on a bond for 12l., the penalty of which was 20l., and nominal damages of 1s. was claimed, judgment was given for the plaintiff on demurrer; the plaintiff claimed his costs because the judgment being for the amount of the penalty 20l., and nominal damages 1s., the amount recovered was more than 20l. and not within the County Court Act, 13 & 14 Vict. c. 61:*

*Held, that the nominal damages amounted to nothing, and plaintiff was not entitled to costs.*

THIS was an action upon an ordinary money-bond, the penal sum of which was 20l.; the actual amount due and intended to be secured by it was only 10l. or 12l.; there was a plea to the action, and a demurrer to that plea, and upon argument judgment was given for the plaintiff, so that the judgment, it was said, would be entered up for the penal sum of 20l., and 1s. damages as for its detention. The costs having been ascertained and the master's allocatur given, a rule *nisi* had been obtained to set aside the master's allocatur under the County Court Extension Act, 13 & 14

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Nominal  
damages.

Vict. c. 61, s. 11, which provided that plaintiffs recovering in the superior courts sums not exceeding 20*l.* are to have no costs.

*Prentice* showed cause.—The judgment recovered is for 20*l.* and 1*s.*; the practice has been to enter it up for the penal sum mentioned in the bond, and nominal damages. The other side will contend it is substantially a judgment for 10*l.* or 12*l.* only, the actual amount due and no more. [BRAMWELL, B.—Does not the Common Law Procedure Act provide for this?] By the 95th section it is enacted that in all actions where the plaintiff recovers a sum of money, the amount to which he is entitled may be awarded to him by the judgment generally without any distinction being therein made as to whether such sum is recovered by way of a debt or damage. He also referred to 1 Saund. 58 b, note f, as to an action on a bond. This being therefore a judgment for 20*l.* 1*s.*; the master's allocatur is correct. [POLLOCK, C. B.—Does this question arise upon a judgment on demurrer?] Yes.

*D. D. Keane*, in support of the rule, was not called upon.

POLLOCK, C. B.—I am of opinion this rule should be made absolute. The amount recovered by the action was only the 10*l.* or 12*l.* that has been referred to, secured by the bond. And as to the nominal sum as damage for its detention, *Beaumont v. Greathead*, 2 C. B. 494, decides that a plaintiff is not entitled to claim nominal damages for the detention of the debt.

BRAMWELL, B.—I also think this rule should be absolute. If the penalty of the bond had been 30*l.* instead of 20*l.*, it would have required some consideration, whether the penalty, being for a sum more than 20*l.*, the plaintiff may have been entitled to his costs; but as the penalty in this case is 20*l.* and no more, the plaintiff is not entitled to anything for nominal damage, according to the case which my Lord Chief Baron has mentioned, of *Beaumont v. Greathead*. As Maule, J., there said, "Nominal damages, in fact, mean a sum of money that may be spoken of, but that has no existence in point of quantity." Under the old proceedings the form of the entry was, no doubt, as Mr. Prentice has stated; but the 95th section of the Common Law Procedure Act was intended to get rid of that, and it accordingly provides that the amount to which he is entitled may be awarded to him by the judgment generally, without any distinction being therein made as to whether such sum is recovered by way of debt or damages. My determination of this case is, that the penalty is no more than 20*l.*, and according to the authority of *Beaumont v. Greathead*, nominal damages are nothing.

WATSON, B.—I am also of the same opinion, and for two reasons: nominal damages are sought to be added to the penalty of the bond 20*l.*, so that the amount may exceed 20*l.* to entitle the plaintiff to his costs on suing in the superior court. The case that has been referred to decides, in effect, that he cannot recover such nominal damage. Then the amount of the debt itself recovered by this action is 12*l.* only, and the 95th section of the Common Law Procedure Act says that a judgment for a money

demand shall be for the amount to which the party is entitled without any distinction between debt and damages. I must say that I am glad we have come to this decision, as it is, in my opinion, in accordance, not only with the object and intention of the acts of Parliament, but also with the law, common sense and justice.

*Rule absolute.*

GOWERS  
v.  
MOORE.  
—  
1858.  
—  
Costs—  
Nominal  
damages.

## COURT OF QUEEN'S BENCH.

June 10, 1858.

WHEATCROFT v. BELL.

*Trial of issue in the County Court by judge's order—19 & 20 Vict. c. 108, s. 26—Costs.*

*The master having taken as his guide the scale of fees in the County Courts for actions above 20l., in taxing the costs of the proceedings in the County Court on the trial of an action brought in the superior court, but ordered by a judge under 19 & 20 Vict. c. 108, s. 26, to be tried in a County Court, this court refused to review his taxation.*

THIS was an action brought in this court to recover the sum of 68l. 7s. 6d. for goods sold and delivered. The defendant paid 42l. 2s. 6d. into court, and on the 3rd November, 1857, an order was made by Erle, J., directing that the issue joined as to the balance should be tried before the judge of the County Court of Nottinghamshire held at Bingham. Accordingly the cause was so tried on the 13th January, when the defendant obtained a verdict. The defendant afterwards carried in his costs for taxation, made out on the ordinary scale in actions in the superior courts above 20l. The master, however, was of opinion that he could only allow the costs of and relating to the trial according to the scale of the County Court, and he so taxed them accordingly. The defendant then obtained the present rule for the master to review his taxation.

*Bell* showed cause.—The 19 & 20 Vict. c. 108, s. 26 (the County Courts Amendment Act), enables a judge of the superior courts in any action or contract in the superior courts not exceeding 50l. in his discretion, and on such terms as he shall think fit, to order the cause to be tried in any County Court. Sect. 33 enacts that, with respect to proceedings in the County Courts in actions exceeding 20l., a scale of costs shall be framed

WHICH COSTS which, after allowance by the Lord Chancellor, is to be in force in every County Court. Sect. 34 enacts that, with respect to such proceedings as are specified in sect. 33, the costs are to be taxed by the registrar of the County Court in which such costs were incurred. It is submitted that the trial of this action was a proceeding in the County Court within the meaning of sect. 33, and carried with it all the necessary incidents of a trial in a County Court, one being that the costs of the proceeding should be taxed on the County Court scale. Again, sect. 26 enables the judge of the superior court to order the trial to take place in the County Court, on such terms as he shall think fit; and the plaintiff might have applied, when the order was granted, that it should be on condition that the costs should be taxed on the scale in the superior courts. The object of sect. 26 was to render proceedings less expensive.

WHEATCROFT  
v.  
BELL.  
—  
1888.  
—  
Trial of issue—  
Judge's order—  
Costs.

*Merewether*, in support of the rule.—The object of sect. 26 was to consult the convenience of the witnesses and parties by bringing the place of trial near to their abodes, and not to incorporate the County Court scale of taxation into the action brought in the superior courts. There is no express enactment taking away the right to costs which the defendant had by statute, on a verdict found for him in an action in the superior court. This is not a proceeding in the County Court for the purpose of taxation of costs, and if it were the registrar of the County Court should be the taxing officer under sect. 34. The masters in the Common Pleas and Exchequer have followed a different rule than the one acted upon by Master Turner in this case.

Lord CAMPBELL, C.J., said the defendant was entitled to such costs as the law provided, and with respect to proceedings in the County Court his costs ought to be taxed according to the scale of fees provided for proceedings in the County Court. The judge's order was silent as to the costs, but either side might have applied to the judge to give special directions as to the costs. As it was the judge had no reason to suppose that the scale of fees of the County Court would not do justice. The master, seeing that the trial had been in the County Court, had properly taken as his guide the County Court scale of fees.

The other judges were of the same opinion.

*Rule discharged.*





